SUPREME COURT OF THE UNITED STATES

No. 14-613

Title:	Marvin Green, Petitioner
	v.
	Megan J. Brennan, Postmaster General
Docketed:	November 26, 2014
Linked with 14A368	
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Nos.:	(13-1096)
Decision Date:	July 28, 2014

Questions Presented

—Date—	——Proceedings and Orders——————————
Oct 2 2014	Application (14A368) to extend the time to file a petition for a writ of certiorari from October 26, 2014 to November 26, 2014, submitted to Justice Sotomayor.
Oct 6 2014	Application (14A368) granted by Justice Sotomayor extending the time to file until November 26, 2014.
Nov 25 2014	Petition for a writ of certiorari filed. (Response due December 29, 2014)
Dec 23 2014	Order extending time to file response to petition to and including January 28, 2015
Jan 26 2015	Order further extending time to file response to petition to and including February 27, 2015.
Feb 19 2015	Order further extending time to file response to petition to and including March 16, 2015.
Mar 11 2015	Order further extending time to file response to petition to and including March 18, 2015.
Mar 18 2015	Brief of respondent Megan J. Brennan, Postmaster General in opposition filed.
Mar 31 2015	Reply of petitioner Marvin Green filed.
Apr 1 2015	DISTRIBUTED for Conference of April 17, 2015.
Apr 20 2015	DISTRIBUTED for Conference of April 24, 2015.
Apr 27 2015	Petition GRANTED.
May 15 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 6, 2015.
May 15 2015	The time to file respondent's brief on the merits is extended to and including August 27, 2015.
Jun 30 2015	Letter from the Solicitor General informing Clerk of their position on the merits.
Jul 6 2015	Joint appendix filed. (Statement of costs received).
Jul 6 2015	Brief of petitioner Marvin Green filed.
Jul 13 2015	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., and National Women's Law Center filed.
Jul 13 2015	Brief amicus curiae of The National Employment Lawyers Association filed.
Jul 28 2015	Catherine M.A. Carroll, Esq., of Washington, D. C., is invited to brief and argue this

	case, as amicus curiae, in support of the judgment below. Briefs of other amici curiae in support of the judgment below are to be filed within 7 days of the filing of the brief of Court-appointed amicus curiae.
Jul 28 2015	Brief of respondent Megan J. Brennan, Postmaster General in support of affirmance filed.
Aug 3 2015	The time to file the brief of the Court-appointed amicus curiae is extended to and including September 28, 2015.
Sep 28 2015	Brief of Court-appointed amicus curiae in support of the judgment below filed.
Oct 2 2015	Motion for allocation of argument time filed by respondent Megan J. Brennan, Postmaster General (on behalf of the parties and Court-appointed amicus curiae).
Oct 5 2015	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
Oct 5 2015	Brief amicus curiae of New England Legal Foundation filed.
Oct 9 2015	SET FOR ARGUMENT on Monday, November 30, 2015
Oct 19 2015	Record requested from U.S.C.A. 10th Circuit
Oct 19 2015	Record from the U.S.C.A. 10th Circuit is electronic and located on PACER, with the exception of 1 Box.
Oct 27 2015	CIRCULATED
Oct 28 2015	Reply of petitioner Marvin Green filed. (Distributed)
Oct 28 2015	Reply of respondent Megan J. Brennan, Postmaster General in support of affirmance filed. (Distributed)
Oct 30 2015	Motion for allocation of argument time GRANTED.
Nov 30 2015	Argued. For petitioner: Brian Wolfman, Stanford, Cal. For respondent: Curtis E.Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For Court-appointed amicus curiae: Catherine M.A. Carroll, Washington, D. C.

14-613

No. 14-___

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

PATRICK R. DONAHOE, Postmaster General,
United States Postal Service,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal employment discrimination law, does the filing period for a constructive discharge claim begin to run when an employee resigns, as five circuits have held, or at the time of an employer's last allegedly discriminatory act giving rise to the resignation, as three other circuits have held?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marvin Green respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a) is published at 760 F.3d 1135. The opinion of the district court (Pet. App. 28a) is unpublished but is available at 2013 WL 424777.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2014. Pet. App. 1a. On October 6, 2014, Justice Sotomayor extended the time to file this petition for a writ of certiorari to and including November 26, 2014. *See* No. 14A368. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 2000e-3(a) provides in relevant part that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

29 C.F.R. § 1614.105(a)(1) provides that "[a]n aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter

alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action."

INTRODUCTION

Every year, thousands of employees bring constructive discharge claims under Title VII of the Civil Rights Act of 1964 and related statutes prohibiting workplace discrimination. Under constructive discharge doctrine, if those employees "resign because of unendurable working conditions," they are entitled to the same remedies available to employees who have been formally discharged in violation of those anti-discrimination statutes. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004). To bring such claims to court, employees must first seek redress in mandatory administrative proceedings.

Yet the federal courts of appeals are intractably divided over *when* employees must initiate those proceedings. Five courts of appeals have held that the filing period for a constructive discharge claim begins when the employee resigns, defined as the date when he gives "definite notice" of his decision to leave. *Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000). This is the earliest date that the claim is complete and actionable. By contrast, three other courts of appeals, including the Tenth Circuit below, start the filing period with the employer's last discriminatory act allegedly giving rise to the resignation – before the constructive discharge claim exists.

The federal government itself has provided conflicting answers to the question presented. The Equal Employment Opportunity Commission (EEOC)

has taken a position consistent with the majority rule, but in the proceedings below the United States Postal Service, represented by the Department of Justice, argued for the minority's last-act rule.

This case – in which the choice between these two timeliness rules is outcome-determinative – provides the Court with an ideal vehicle to restore uniformity to the legal landscape, ensuring that constructive discharge claims will no longer turn on geographical happenstance.

STATEMENT OF THE CASE

A. Legal Background

1. Constructive discharge doctrine treats "an employee's reasonable decision to resign because of unendurable working conditions" as a termination by the employer. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894 (1984). The doctrine emerged in the 1930s, when it proved necessary to resolve labor disputes "in which employers coerced employees to resign," rather than simply discharging them. *Suders*, 542 U.S. at 141. By the time Congress began enacting statutes prohibiting employment discrimination in the 1960s, the claim was "solidly established in the federal courts," and it was applied in these new statutory contexts. *Id.* at 141-42.

A constructive discharge claim "involves both an employee's decision to leave and precipitating conduct." *Suders*, 542 U.S. at 148. At its heart, the claim turns on whether the employee's resignation should be treated as a termination. "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the

employee's position would have felt compelled to resign?" *Id.* at 141.

In federal anti-discrimination law, as in other contexts, the doctrine aims to ensure that employers cannot "accomplish indirectly what the law prohibits being done directly" – namely, circumvent various prohibitions against firing employees for discriminatory or retaliatory reasons. 1 Barbara T. Lindemann et al., Employment Discrimination Law 21-33 (5th ed. 2012). For that reason, employees who prove a constructive discharge may recover "all damages available for formal discharge . . . including both backpay and, in fitting circumstances, frontpay." *Suders*, 542 U.S. at 147 n.8.

2. Employees bring thousands of constructive discharge claims to the federal Equal Employment Opportunity Commission (EEOC) every year.[1] These complaints principally arise under Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin; the Age Discrimination in Employment Act (ADEA), which prohibits discrimination against older workers; and the Americans with Disabilities Act (ADA), which prohibits discrimination against workers with disabilities. The major employment discrimination statutes all prohibit retaliation against an employee who advanced a prior claim of discrimination. *See* 42

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[1] *See Statutes by Issue FY 2010 – FY 2013*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited Nov. 19, 2014).

U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA).

These employment discrimination laws share a common approach to enforcement, requiring employees first to pursue their claims through administrative channels before turning to the courts. *See Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1308-09 (10th Cir. 2005). These redress procedures form part of a system "in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). The process includes certain time windows – 180 or 300 days after discrimination occurs for private-sector employees, 45 days for federal government employees – within which employees are expected to report discrimination.[2]

Although some aspects of the process are different for federal employees than they are for

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[2] In the federal sector, employees pursuing claims under any of the major employment discrimination statutes "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). In the private sector, "[a] charge . . . shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred," or, if state proceedings are also initiated, "within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier." 42 U.S.C. § 2000e-5(e)(1) (Title VII); *see also* 42 U.S.C. § 12117(a) (incorporating the Title VII process for ADA complaints); 29 U.S.C. § 626(d)(1) (setting forth the same time limits for ADEA complaints).

private-sector employees, courts regularly apply timeliness and other procedural rules recognized in one sector to the other. *See, e.g.*, *Lapka v. Chertoff*, 517 F.3d 974, 981-82 (7th Cir. 2008) (finding that a timeliness rule developed in a private sector context "provides the appropriate standard" in federal-sector cases); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (holding that equitable tolling rules "applicable to suits against private defendants should also apply to suits against the United States"). For both categories of employees, a failure to initiate a complaint in the administrative process within the applicable timeframe creates a nonjurisdictional bar to any later suit. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

B. Factual And Procedural Background

1. This case turns on a timeliness defense asserted by the Postal Service to defeat petitioner Marvin Green's constructive discharge claim.

In 2008, Mr. Green, then postmaster for Englewood, Colorado, applied for a promotion. Pet. App. 29a. Building on a thirty-five year career in which he began as a letter carrier and rose through the ranks of the Postal Service, Mr. Green sought to fill a recently vacated postmaster position in nearby Boulder, Colorado. Appellant's Court of Appeals Appendix (CA10 App.) 32; Pet. App. 3a. Despite an unblemished record, he was passed over for the job. *Id.* Believing that the person hired was less experienced and had not even submitted an application, CA10 App. 34, Mr. Green thought he was being discriminated against because he is black. Pet.

App. 3a. He contacted a Postal Service EEO counselor to have his concerns investigated. *Id.*

Relations with his supervisors soured in the wake of his discrimination complaint. Pet. App. 3a. In 2009, while his complaint proceeded through administrative channels, Mr. Green expressed concern that he was the victim of retaliation, twice seeking help from Postal Service EEO counselors. *Id.* Things came to a head in November of that year. Shortly after the EEOC assigned an administrative law judge to oversee discovery concerning the nonpromotion, *see* CA10 App. 673-77, Mr. Green received a one-page letter from his Postal Service superiors, summoning him to appear for an "investigative interview" and suggesting that he consider having a union representative present, *id.* 433.

At that meeting, held on December 11, 2009, Postal Service supervisors confronted him with various mismanagement allegations, most seriously accusing him, without any prior notice, of "intentionally delaying the mail" – a criminal charge. CA10 App. 714-15, 804. Agents from the Postal Service's Office of the Inspector General (OIG), who had been contacted about the mail-delay charge, also showed up at the December 11 meeting to investigate, and Mr. Green was ordered to meet with them. Pet. App. 4a. Finally, citing Mr. Green's alleged "[d]isruption of day-to-day postal operations," his superiors reassigned him, effective immediately, to "Emergency Placement in Off-Duty Status." CA10 App. 600. They informed him that he could not return to duty until "the cause for nonpay status cease[d]" and suspended his pay. *Id.* 600, 795.

Rattled, Mr. Green sought help from his union representative, who in turn entered into a flurry of negotiations with a senior human resources manager, David Knight. Pet. App. 5a. While the negotiations unfolded, Mr. Green remained without pay, on indefinite leave, and, he believed, under threat of criminal prosecution.

In fact, "[u]nknown to Green, the OIG agents had concluded at the end of the [December 11] interview that Green had not intentionally delayed the mail." Pet. App. 5a. Nevertheless, the next day, Mr. Knight told Mr. Green's union representative that "the OIG is all over this" and the charge is a "criminal issue" that "could be a life changer." CA10 App. 974.

After several days of back-and-forth, a deal was struck and signed on December 16, 2009. Pet. App. 5a. Under the agreement, Mr. Green's emergency placement ended, and he was allowed to use accumulated annual and sick leave to receive his then-current salary through March. CA10 App. 610. But he was also removed from his Englewood position and demoted to a placement in Wamsutter, Wyoming. Pet. App. 5a. The agreement required him to either "report for duty in Wamsutter . . . on April 1" or "take all necessary steps to effect his retirement on or before March 31." CA10 App. 610. If he had reported to Wamsutter, his pay would have been cut by nearly $40,000 per year. *Id.* 73. In sum, Mr. Green "could choose either to retire or to work in a position that paid much less and was about 300 miles away." Pet. App. 2a.

After spending January 2010 going through the Postal Service's internal EEO process to challenge the original emergency placement decision – without

success – Mr. Green submitted his resignation on February 9, effective on the last day of March. Pet. App. 6a.

2. Mr. Green contacted an EEO counselor on March 22, forty-one days after his February 9 resignation. Pet. App. 6a. He alleged that, given the choice he was forced to make, he had been constructively discharged in retaliation for protected Title VII activity. CA10 App. 722-25. The agency accepted the complaint for investigation. Pet. App. 6a-7a.

The parties agree that Mr. Green's complaint of constructive discharge, if timely, properly initiated the EEO process. They also agree that Mr. Green thereafter timely pursued the remaining administrative remedies available to him. *See* CA10 App. 40, 199.

3. Mr. Green then filed suit in the District of Colorado against respondent, the Postmaster General. The district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1343.

Mr. Green alleged, in five distinct claims, unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964. Pet. App. 7a. Three of those claims were dismissed on procedural grounds by both the district court and the Tenth Circuit and are not at issue here. *Id.* 2a, 7a. The district court also dismissed another claim based on Mr. Green's placement on "emergency" unpaid leave for five days, but the Tenth Circuit reversed the lower court's finding that the placement was not adverse and remanded. *Id.* 23a-27a. That claim also is not before this Court.

Regarding the claim at issue here – Mr. Green's constructive discharge – the district court found that his signing the December 16 agreement triggered the forty-five-day filing period, even though the agreement left him a choice between retirement and relocation to Wyoming. Pet. App. 37a-39a. The district court concluded that when the agreement was signed the Postal Service's conduct had "culminated" and the writing was on the wall. *Id.* Because Mr. Green had not initiated contact with an EEO counselor on his constructive discharge claim within forty-five days of that date, the court held, his claim was time-barred. *Id.*

4. The Tenth Circuit affirmed, holding, as a general proposition, that the filing period for a constructive discharge claim begins to run from the time of the employer's alleged "last discriminatory act" said to give rise to the resignation, not from the resignation itself. Pet. App. 15a-22a.

The court of appeals recognized that other circuits have embraced a different rule – that the filing period begins "on the date the employee resigned." Pet. App. 19a. And it acknowledged that its decision was at odds with the practical reality that a claim for constructive discharge "cannot be submitted before the employee quits his job." *Id.* 22a.

But concerned that the other circuits' position would "allow[] the employee to extend the date of accrual indefinitely," the Tenth Circuit rejected the date-of-resignation rule. Pet. App. 20a-22a. The panel instead joined two other circuits in holding that the limitations period is triggered by the "last discriminatory act" of the employer allegedly giving rise to the resignation. *Id.* 20a. Finding that Mr.

Green could not show that "the Postal Service did anything more to him after December 16," the panel held that his March 22 contact with an EEO counselor was outside the forty-five-day limitations period. *Id.* 22a.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Intractably Split Over When The Filing Period For A Constructive Discharge Claim Begins To Run.

The courts of appeals are divided over which of two conflicting rules governs when the filing window for a constructive discharge claim opens under federal employment discrimination law. The Tenth Circuit's decision deepened that split, which will not be resolved without this Court's definitive guidance.

A. Five Courts Of Appeals Have Held That The Filing Period Starts When An Employee Resigns.

1. A majority of the circuits to have considered the question have ruled that the filing period for a constructive discharge claim begins to run on the date the employee resigns. In declining to adopt that approach, the Tenth Circuit acknowledged that its view is at odds with the established rule of several other circuits. Pet. App. 19a.

The Fourth Circuit first articulated the majority rule over twenty-five years ago. It held that "resignation *is* a constructive discharge – a distinct discriminatory 'act' for which there is a distinct cause of action." *Young v. Nat'l Ctr. for Health Servs. Research*, 828 F.2d 235, 238 (4th Cir. 1987) (emphasis added). Young resigned from work eight

days after her employer's discriminatory conduct resulted in her suspension. *Id.* at 237. The district court decision below had measured the time period from the suspension date and dismissed the claim. *Id.* at 238-39.[3] But because the court treated Young's resignation as an "act" of her employer, it concluded that she had timely filed her claim and reversed. *Id.* at 237-39.

The Ninth Circuit has reached the same conclusion, holding, "like the Fourth Circuit, that in constructive discharge cases periods of limitation begin to run on the date of resignation." *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998).

Expressly "agree[ing] with the Ninth Circuit," the Second Circuit in *Flaherty v. Metromail Corp.*, 235 F.3d 133 (2000), held that the filing period begins when an employee gives "definite notice of her intention to retire" – a rule, the court emphasized, that "should be the same in all cases of constructive discharge." *Id.* at 138. The court made clear that the date of notice – and not the employee's last day at work several months later or any act of the employer – started the filing period. *Id.* at 138-39.

In addition to those three circuits, which the Tenth Circuit acknowledged have adopted a date-of-resignation rule, Pet. App. 19a, the First and Eighth Circuits have adopted the same rule. In *Hukkanen v.*

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[3] *See Young v. Nat'l Ctr. for Health Servs. Research*, 704 F. Supp. 88, 88 & n.* (D. Md. 1988) (setting forth relevant dates), *aff'd*, 887 F.2d 1082 (4th Cir. 1989), *cert. granted, judgment vacated*, 498 U.S. 1019 (1991).

Int'l Union of Operating Eng'rs, Hoisting & Portable Local No. 101, 3 F.3d 281 (8th Cir. 1993), the Eighth Circuit held that an employee's discrimination charge was timely after concluding that her employer's "last act of discrimination against [her] *was* her constructive discharge," or forced resignation. *Id.* at 285 (emphasis added). Hukkanen was subjected to sex discrimination through August 1984. *Id.* She resigned in October and filed her EEOC charge in March 1985. *Id.* Given the 180-day filing period, her charge was timely when measured from the date of resignation. But it would have been untimely if measured from the employer's alleged last act of discrimination, as the Tenth Circuit's rule would have required.

Similarly, the First Circuit has held that, for a constructive discharge claim, "the limitations period commenced when the employees elected to participate" in an early retirement program. *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 123 (1st Cir. 1998). There, American Airlines had presented a "'take it or leave it'" choice of retiring early or risking involuntary termination – its sole allegedly discriminatory act – to all the employees on the same date, but it gave them roughly two months to decide whether to accept. *Id.* The court used the various individual dates on which each employee submitted his or her formal resignation as the beginning of the filing periods. *Id.* at 123 & n.12.

2. The Tenth Circuit was wrong when it suggested that "[p]erhaps" the conflicting cases it had identified from other circuits "could be distinguished

on the ground that the last act of discrimination was within the limitations period." Pet. App. 20a.

In *Young*, for example, the claim was timely only because the Fourth Circuit measured the filing window from the date the employee officially resigned. 828 F.2d at 238. At the time, federal employees like Young and Green had thirty days to contact an EEO counselor. *See id.* at 237 Young filed her EEO claim thirty-seven days after her suspension – the employer's last act giving rise to her resignation. *See id.*; *Young*, 704 F. Supp. at 88 n.* She resigned, however, twenty-nine days before she filed, and, on that basis, the claim was timely. *Young*, 828 F.2d at 238.

Moreover, in the Eighth Circuit's decision in *Hukkanen* – which the Tenth Circuit did not discuss – the offending conduct extended through August, the employee resigned at the end of October, and she filed an EEOC charge the following March. 3 F.3d at 285. Given the 180-day filing window, had the court applied the Tenth Circuit's rule, the clock would have run out in February, making her March charge untimely. *See id.*

In any case, the remaining decisions cited by the Tenth Circuit cannot be "distinguished" because each establishes a generally applicable rule governing future constructive discharge cases. The Ninth Circuit expressly adopted the general rule established by the Fourth Circuit in *Young*. *See Draper*, 147 F.3d at 1111. And the Second Circuit, as noted, stated that its date-of-resignation rule "should be the same in all cases of constructive discharge." *Flaherty*, 235 F.3d at 138.

In sum, had Mr. Green been employed in any of the circuits that have a date-of-resignation rule, binding precedent would have rendered his claim timely and required it to be resolved on its merits.

B. Three Courts Of Appeals, Including The Tenth Circuit Below, Have Rejected The Majority Rule.

By contrast, in three circuits, employees like Mr. Green lose their claims before reaching the merits. That is what happened to Mr. Green in the Tenth Circuit, which joined two other circuits in pegging the running of the filing period to "some discriminatory act by the employer within the limitations period." Pet. App. 22a.

The Seventh Circuit was the first to hold that the filing period for a claim of constructive discharge is triggered on the date that an employer "takes some adverse personnel action" against its employee. *Davidson v. Indiana-American Water Works*, 953 F.2d 1058, 1059 (7th Cir. 1992). It endorsed the district court's conclusion that the employee, who had alleged harassment by a supervisor, did not timely file her claim because she presented it "more than 180 days after her transfer out of [her supervisor's] department, where the last discriminatory act against her took place." *Id.*

The D.C. Circuit adopted the same rule in *Mayers v. Laborers' Health & Safety Fund of North America*, 478 F.3d 364 (D.C. Cir. 2007) (per curiam). Because an employee alleging constructive discharge under the ADA "failed to identify a single act of discrimination or retaliation" within the limitations period – apart from her resignation, which the court

declined to treat as an "act" of her employer – the court dismissed her constructive discharge claim as untimely. *Id.* at 370.

The Court should grant review to resolve this deep and longstanding conflict among the circuits.

II. The Question Presented Is Important To Employees And Employers.

As long as the question presented remains unanswered by this Court, thousands of employees and their employers operate in a legal environment lacking predictability and uniformity. Not only have eight courts of appeals arrived at conflicting rules, but the federal government itself has advanced different positions over the years. This uncertainty should not persist.

1. This Court views timeliness questions under the anti-discrimination statutes as important. Thus, the Court repeatedly has granted review to resolve questions about how time limits apply to employees pursuing employment discrimination claims. *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621, 623-32 (2007) (disparate pay claim was untimely); *Nat'l Passenger R.R. Corp. v. Morgan*, 536 U.S. 101, 105 (2002) (hostile work environment claim was timely if underlying conduct outside the statutory period was related to any conduct within it); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 108-09 (2002) (claim initiated but not verified within the applicable filing period was timely); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (equitable tolling applied to federal- and private-sector timeliness requirements alike); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123-25 (1988) (300-

day federal filing period applied even when a state-agency charge was untimely under state law); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (time limit for filing administrative claim was non-jurisdictional); *Del. State Coll. v. Ricks*, 449 U.S. 250, 256-59 (1980) (claim was untimely because filing period began when discriminatory decision was made); *Int'l Union of Elec., Radio & Mach. Workers, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 241-44 (1976) (discharge claim was timely given retroactive application of expanded filing window).

The Court should grant review here as well. Thousands of constructive discharge claims are brought each year. In 2013 alone, the EEOC received 4,297 constructive discharge complaints under Title VII, 1,185 under the ADEA, and 1,705 under the ADA.[4] More than 5,000 complaints received by the EEOC in 2013 alleged constructive discharges that, like Mr. Green's, were retaliation for prior protected EEO activity.[5] Agencies and courts must determine the timeliness of each of these administrative complaints, and they cannot do so consistently absent a clear answer as to when the clock starts running.

2. While the split over this question persists, employers' liability for otherwise identical

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[4] *Statutes by Issue FY 2010 – FY 2013*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited Nov. 19, 2014).

[5] *Bases by Issue FY 2010 – FY 2013*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm (last visited Nov. 19, 2014).

constructive discharge claims varies from circuit to circuit.

Allowing geographical happenstance to affect the timeliness of the thousands of constructive discharge claims brought each year produces untenable results for employers as well as employees. For instance, a company operating both in the District of Columbia, where the D.C. Circuit's rule controls, and in its suburbs, where the Fourth Circuit's rule controls, faces different consequences for otherwise identical constructive discharge claims, depending on the jurisdiction in which those claims arise. Moreover, companies that operate nationwide not only must litigate under both rules, but also face uncertainty in the handful of circuits where no rule has yet been announced.

By contrast, clear and uniform limitation periods vindicate the interests of both employees and employers. Because limitation periods protect employees "who promptly assert their rights" as well as employers "from the burden of defending claims arising from employment decisions that are long past," *Ricks*, 449 U.S. at 256-57, this Court can provide clarity that will benefit all parties and promote proper resolution of claims. Indeed, because constructive discharge claims have "profound consequences in employment litigation, with respect to both liability and damages," there is a particular need to resolve the circuit conflict presented here. 1 Barbara T. Lindemann et al., Employment Discrimination Law 21-2 (5th ed. 2012).

3. The Government's own position has been inconsistent, heightening the importance of resolving the question presented.

Although Department of Justice lawyers argued below for what is now the Tenth Circuit's rule, Def. C.A. Br. 40-47, the EEOC has taken a contrary view. In an amicus brief, the EEOC – the federal agency charged with interpreting and enforcing federal employment discrimination law – cited the First, Second, Fourth, and Ninth Circuit decisions that adopted the date-of-resignation rule and *agreed* with them. *See* Brief of the EEOC as Amicus Curiae in Support of the Appellant at 9-10, 12, *Bailey v. United Airlines, Inc.*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245. The EEOC explained that the "operative date" for opening the filing window is "the date on which the *employee acts* on the option" to retire or risk termination. *Id.* at 10 (emphasis added). In other words, the limitations period begins to run when the employee "'effectively communicate[s] her intention to resign.'" *Id.* at 9 (alteration in original) (quoting *Flaherty v. Metromail Corp.*, 235 F.3d 133, 139 (2d Cir. 2000)). The EEOC went on to say that this approach is correct because "[a]n employee . . . should not have his hand forced before a claim has ripened." *Id.* at 12. Moreover, in its adjudicative capacity, the EEOC has adopted a variation of the date-of-resignation rule, tying the running of the clock to the effective date of an employee's resignation.[6]

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[6] *See* Gard v. Frank, EEOC Doc. No. 05890730, 1989 WL 1007278 (Sept. 8, 1989) (applying the effective-date rule to reverse an agency's dismissal for untimeliness); *see also, e.g.*, [Anonymous] v. Shinseki, EEOC Doc. No. 0120141607, 2014 WL 3697473 (July 18, 2014) (same).

III. This Case Is An Ideal Vehicle For Resolving The Conflict Among The Circuits.

This case provides this Court a particularly suitable vehicle to resolve the question presented.

1. An answer to the question presented will be outcome determinative for Mr. Green's constructive discharge claim. Under the majority rule, Mr. Green's claim would be timely, but under the minority rule, it was time-barred.

2. This case provides an opportunity to distinguish between the employee's resignation and the employer's last discriminatory act said to give rise to the resignation – dates that may overlap in other cases. In cases where the last act said to give rise to the resignation occurs on the same day as the resignation itself, it is impossible to consider the two rules except in the abstract. By contrast, here, these dates are distinct and uncontested, making this case an ideal vehicle for this Court to test the competing theories of timeliness over which the lower courts are divided.

3. A favorable outcome for Mr. Green will enable him to recover "all damages available for formal discharge," including backpay and possibly frontpay as well. *Pa. State Police v. Suders*, 542 U.S. 129, 147 n.8 (2004). By contrast, the remaining claim in the case, now remanded to the district court, allows only for the recovery of damages arising from the five days Mr. Green spent on emergency leave. Thus, his constructive discharge claim is fundamental to the further conduct of his case. *See Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945).

IV. The Tenth Circuit's Decision Is Incorrect.

The filing period for raising constructive discharge claims should not begin before the employee resigns. The Tenth Circuit's contrary holding – that the period runs from an employer's "last discriminatory act" allegedly giving rise to the resignation – disregards this Court's precedent and the purpose of constructive discharge doctrine. The Court should grant review and reverse the decision below.

1. The majority rule correctly begins the filing period when all elements of a constructive discharge claim are present, consistent with the default rule for limitations periods.

The Court has "repeatedly recognized that Congress legislates against the standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Graham Cnty. Soil & Water Conservation Dist. v. United States* ex rel. *Wilson*, 545 U.S. 409, 418 (2005) (internal quotation marks omitted). This well-established default rule exists in part because "[i]t would clearly be unfair to charge the plaintiff with the expiration of any time before the plaintiff's cause of action could be prosecuted to a successful conclusion." 1 Calvin W. Corman, Limitation of Actions § 6.1 (1991).

Nothing in the relevant federal employment discrimination statutes alters that default rule here. An employee must actually resign to have a valid claim for constructive discharge. 1 Barbara T. Lindemann et al., Employment Discrimination Law 21-46 (5th ed. 2012). And because resignation is a

required element of constructive discharge, it makes no sense for the filing period for a constructive discharge claim to begin before the employee has resigned.

The Tenth Circuit's rule, however, allows the filing period to begin before all elements of a constructive discharge claim are present. Accordingly, the court of appeals held that Mr. Green's filing period expired ten days before he resigned. His opportunity to contest his constructive discharge came and went before he had any claim to bring. The majority rule properly rejects this anomalous result.

2. Particularly in light of the EEOC enforcement regime to which its rule applies, the Tenth Circuit erred in adopting an ambiguous standard that is difficult to administer.

Administrability is especially important in the employment discrimination context, where thousands of complaints are considered by administrative agencies and federal courts each year. That principle undergirded this Court's decision in *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988), which held that a 300-day federal filing window applies to employees who lodge complaints with state agencies whether that claim was timely under state law or not. Electing the rule that avoided "embroil[ing] the EEOC in complicated issues" at the threshold stage, the Court rejected an alternative that would have required the EEOC to undertake burdensome case-by-case analyses of state law. *Id.* at 124.

The minority rule adopted by the Tenth Circuit below contravenes this principle by requiring agencies and courts to conduct a nuanced inquiry at the threshold of a constructive discharge case. Determining whether an employer's conduct rises to the level of a discriminatory act is a context-dependent endeavor because the significance of any given act "often depends on a constellation of surrounding circumstances, expectations, and relationships." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) (internal quotation marks omitted). By pegging the beginning of the filing period to the employer's last discriminatory act, the minority rule may require an adjudicator to sift through disputed timelines and contested evidence to determine which acts were discriminatory for the purposes of the timing inquiry and when exactly they occurred.

The majority rule, by contrast, is easy to administer. The claim accrues, and the limitations period begins to run, when the employee resigns – a discrete, readily identifiable act. That rule is "easily understood by complainants and easily administered by the EEOC." *Commercial Office Prods.*, 486 U.S. at 124.

To be sure, courts must sometimes inquire into the date of an alleged last discriminatory act. But this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), instructs that whether this inquiry is necessary "varies with the practice" at issue. *Id.* at 110. The "very nature" of a hostile work environment claim, for instance, "involves repeated conduct." *Id.* at 115. As such, courts have no option but to undertake the challenge

of identifying a "last act" among many to determine when a filing period begins. But although such last acts are difficult to ascertain, "[d]iscrete acts such as termination . . . are easy to identify." *Id.* at 114. Indeed, as noted earlier, constructive discharge claims cannot exist until the occurrence of a particular discrete act – the employee's resignation. A last-act rule is both unnecessary and ill-fitting.

3. Clear rules are especially appropriate in a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *Commercial Office Prods.*, 486 U.S. at 124.

The need to accommodate laypeople provides "a guiding principle for construing the provisions of Title VII." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982). In *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), for example, this Court declined to construe Title VII to require that an employment discrimination charge be verified within the filing period, in part to "ensure[] that the lay complainant . . . will not risk forfeiting his rights inadvertently." *Id.* at 115. In other words, "limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Del. State Coll. v. Ricks*, 449 U.S. 250, 262 n.16 (1980).

Under the Tenth Circuit's rule, however, the limitations period begins to run before the employee has resigned. Employees are unlikely to know or even suspect that their filing period is limited in this way, presenting an obstacle nowhere evident in the relevant statutes or regulations. The majority rule, by contrast, gives employees ample opportunity to present meritorious claims.

Aware that its rule could result in employees unwittingly forfeiting valid claims, the Tenth Circuit suggested that employees "could likely amend" earlier-filed administrative charges to include a constructive discharge claim. Pet. App. 22a.

But the possibility of amending is not the panacea the Tenth Circuit envisioned. The need to amend is particularly problematic for laypeople, who likely will not know about it. The Tenth Circuit's approach thus injects a needless additional procedural hurdle at which an employee "risk[s] forfeiting his rights inadvertently," *Edelman*, 535 U.S. at 115. And because constructive discharge is "a distinct discriminatory 'act' for which there is a distinct cause of action," *Young v. Nat'l Ctr. for Health Servs. Research*, 828 F.2d 235, 238 (4th Cir. 1987), some constructively discharged employees will have no earlier complaint to amend.

4. Contrary to the Tenth Circuit's concerns, under the date-of-resignation rule currently prevailing in five circuits, employees have no incentive "to extend the date of accrual indefinitely" or to submit unmeritorious claims. Pet. App. 20a.

There is little reason to believe that delayed suits would materialize. A long-postponed resignation cannot form the basis of a successful constructive discharge claim, absent some compelling reason for waiting. The "freshness of the instances of harassment" affects any adjudication on the merits. *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1110 n.2 (9th Cir. 1998). Employees, then, have every incentive to bring meritorious claims before they are stale, and courts can easily dispose of claims predicated on long-past conduct on the merits. In the

rare case where it is necessary, employers also can assert a laches defense. *Morgan*, 536 U.S. at 121.

Under the Tenth Circuit's rule, it is *employers* who have an incentive to use delaying tactics – to discourage employees from preserving their claims. Employers seeking to avoid liability for constructive discharge may, for example, propose coercive severance agreements or settlements with fairly long periods for employees to consider their options. The clock would begin to run when the employer imposed the choice, but an unwary employee would not know to file a constructive discharge complaint before she decided that resignation was the lesser of two evils.

In other words, by tethering the running of the clock to alleged acts of the employer, the Tenth Circuit's rule encourages what the constructive discharge cause of action seeks to curb – that is, it enables employers to "accomplish indirectly what the law prohibits being done directly," Lindemann, *supra*, 21-33.

5. Contrary to the Tenth Circuit's suggestion, the majority rule better comports with this Court's reasoning in *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

Ricks held that the filing period begins with the occurrence of the discriminatory act at issue – in that case, an employer's decision to deny tenure – and not when a "delayed but inevitable consequence" of that act is felt. 449 U.S. at 257-58. The Tenth Circuit erroneously concluded that *Ricks*' focus on the "'time of the *discriminatory acts*,'" Pet. App. 20a (quoting *Ricks*, 449 U.S. at 258), precluded the use of the

employee's resignation date as the beginning of the limitations period for a constructive discharge claim.

But the Tenth Circuit's analysis overlooks an important aspect of constructive discharge doctrine. It is well established that a "constructive discharge involves *both* an employee's decision to leave *and* precipitating conduct." *Suders*, 542 U.S at 148 (emphases added). For this reason, an employee's resignation cannot be "inevitable" – and the discriminatory act of constructive discharge cannot be complete – until the employee elects to depart rather than tolerate the working conditions created by the employer. Here, for example, Mr. Green's resignation did not become inevitable until he actually decided to retire rather than relocate to Wyoming.

By contrast, the majority rule correctly recognizes that a constructive discharge is itself a discriminatory act, not a delayed but inevitable consequence of prior discrimination. Indeed, the EEOC has interpreted *Ricks* consistent with this view.[7] A faithful application of *Ricks* yields the majority rule: the limitations period for a constructive discharge claim can only begin once the employee has resigned.

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[7] *See* Brief of the EEOC as Amicus Curiae in Support of the Appellant at 5-8, 10-11, *Bailey v. United Airlines, Inc.*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245 (citing *Ricks*, 449 U.S. at 257-58).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARVIN GREEN, Plaintiff-Appellant, v. PATRICK R. DONAHOE, Postmaster General, United States Postal Service, Defendant-Appellee.	No. 13-1096

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 1:10-CV-02201-LTB-KMT)

John Mosby, (Elisa Moran and Marilyn Cain Gordon with him on the briefs), Denver, Colorado, for Plaintiff-Appellant.

Paul Farley, Assistant United States Attorney, (John F. Walsh, United States Attorney, with him on the brief), Denver, Colorado, for Defendant-Appellee.

Before HARTZ, McKAY, and MATHESON, Circuit Judges.

HARTZ, Circuit Judge.

Marvin Green, a former postmaster, claims that the U.S. Postal Service retaliated against him after he made employment-discrimination claims. He was investigated, threatened with criminal prosecution, and put on unpaid leave. Shortly after being put on leave, he signed a settlement agreement with the Postal Service that provided him paid leave for three and a half months, after which he could choose either to retire or to work in a position that paid much less and was about 300 miles away. Ultimately, he decided to retire. He then filed a complaint against Defendant Patrick Donahoe, the Postmaster General, in the United States District Court for the District of Colorado, alleging five retaliatory acts in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.: (1) a letter notifying him to attend an investigative interview; (2) the investigative interview; (3) a threat of criminal charges against him; (4) his constructive discharge; and (5) his placement on unpaid leave (also known as emergency placement). The district court dismissed the first three claims for failure to exhaust administrative remedies. On the two remaining claims it granted summary judgment for Defendant, ruling that the constructive-discharge claim was untimely and that emergency placement was not a materially adverse action. This appeal followed.

We have jurisdiction under 28 U.S.C. § 1291. We affirm the judgment below except for the emergency-placement claim. We agree with Green that the emergency placement was a materially adverse action (being put on unpaid leave would dissuade a reasonable employee from engaging in protected

activity), and we remand the claim for further proceedings.

I. BACKGROUND

Green, who describes himself as a black American, began working for the Postal Service in 1973. He was a manager for 25 years, including 14 years as a postmaster. From 2002 until his retirement in 2010, he was the postmaster at the Englewood, Colorado, post office. At the time of the pertinent events, he had no disciplinary report in his permanent file.

In early 2008 a postmaster position opened in Boulder. Green applied for the position, but his supervisor, Gregory Christ, selected a Hispanic instead. In August 2008, Green filed a formal charge with the Postal Service's Equal Employment Opportunity (EEO) Office, alleging that he had been denied a promotion because of his race. That November, after the EEO Office had completed its investigation, Green requested a hearing before the Equal Employment Opportunity Commission (EEOC). The matter was settled.

In May 2009, Green filed an informal EEO charge alleging that the Postal Service had begun retaliating against him for his prior EEO activity. He alleged that Christ, his supervisor, had threatened, demeaned, and harassed him. He filed a similar informal charge in July, alleging that Christ and Jarman Smith, who had replaced Christ as Green's supervisor, had threatened, demeaned, and harassed him because of his race and his EEO activity regarding the Boulder position. In August the Postal Service's EEO Office completed its

investigation of the May and July charges. It informed Green that he could file a formal charge, but he did not do so.

In November 2009, Green received a letter at his home from Charmaine Ehrenshaft, who was the Postal Service's Manager of Labor Relations for his district. The letter instructed Green "to appear for an investigative interview regarding allegations of non-compliance in the grievance procedure." Aplt. App., Vol. 2 at 433. The letter provides no specifics, but Defendant claims that Green was derelict in his handling of employee grievances between April and December of 2009, resulting in multiple adverse decisions that required the Postal Service to pay damages and penalties to grievants. Green asserts that he and his facility managers had contacted the appropriate person for assistance with the grievances but that the person would not help.

Ehrenshaft and her supervisor, David Knight, the Manager of Human Resources, conducted the investigative interview on December 11, 2009. Green was represented by Robert Podio of the National Association of Postmasters. During the interview Knight asked Green about the processing of grievances, about allegations that he had intentionally delayed the mail by failing to timely sign and return receipts for certified letters related to the grievances, and about allegations that he had sexually harassed a female employee.

When the interview ended, two agents from the Postal Service Office of the Inspector General (OIG) arrived. Knight instructed Green to meet with them.

The OIG, an independent branch of the Postal Service, had initiated its own investigation into delay of the mail, which can be a federal crime.

Knight and Ehrenshaft reappeared when the OIG interview ended. They gave Green a letter informing him that under the Postal Service's emergency-placement policy he was "placed in off-duty status immediately" because of "[d]isruption of day-to-day postal operations." *Id.*, Vol. 3 at 600. It stated that under the policy "[t]he employee is returned to duty status when the cause for nonpay status ceases." *Id.* Knight ordered Green to surrender his Postal Service identification and cell phone and not to return to the Englewood post office.

Unknown to Green, the OIG agents had concluded at the end of the interview that Green had not intentionally delayed the mail. The next day, Podio began negotiating with Knight to resolve the matter. During negotiations Knight e-mailed Podio that the OIG was "all over" the delay-of-mail issue and that "the criminal issue could be a life changer." *Id.*, Vol. 5 at 974.

On December 16, 2009, Green signed a settlement agreement. It provided that he would immediately give up his position as the Englewood postmaster and that he would use accrued annual and sick leave to receive pay until March 31, 2010, after which he could choose either to retire or to accept a position at significantly lower pay in Wamsutter, Wyoming, about 300 miles away. In exchange, the Postal Service agreed that "no charges will be pursued based on the items reviewed during interviews conducted on December 11, 2009."

Id., Vol. 3 at 610. After Green signed, he was paid retroactively for the three days he had been on emergency placement.

On January 7, 2010, Green met with an EEO counselor and filed an informal charge alleging that he had been retaliated against on December 11, the day of the investigative interview, when he was removed from his postmaster position and was issued the emergency-placement letter. He filed the follow-up formal charge on February 17. The EEO Office dismissed the claim a few days later because Green had entered into a settlement agreement. The EEOC upheld the dismissal in August.

On February 9, 2010, Green submitted his retirement papers, effective March 31, 2010. On March 22 he initiated counseling. The Information for Pre-Complaint Counseling that he signed on March 31 alleged that he had been constructively discharged by being forced to retire. On April 23 he followed up with another formal charge. The EEO Office sent Green a letter on April 26 indicating that it had accepted three claims for investigation: (1) that he was constructively discharged (no date specified); (2) that he was downgraded from a level 22 postmaster to a level 13 postmaster on December 19, 2009; and (3) that his pay-for-performance salary increase was stopped. Green's attorney then sent the EEO Office a letter advising it that "the only issue that should be investigated by you is the constructive discharge claim," because the other two claims had been raised in the earlier February 17 charge and dismissed. *Id.*, Vol. 1 at 83. The EEO Office issued a second acceptance letter acknowledging Green's request and

stating that it would investigate only the constructive-discharge claim.

In September 2010 Green filed his complaint in this lawsuit. He filed an amended complaint in July 2011 alleging five retaliatory acts in violation of Title VII: (1) the letter notifying him of the investigative interview, (2) the investigative interview, (3) the threat of criminal prosecution, (4) his constructive discharge, and (5) the emergency placement.

The district court dismissed the first three claims for lack of subject-matter jurisdiction, ruling that Green had not exhausted his administrative remedies because he had not adequately presented those claims in his EEO charges. It later found that Ehrenshaft had in bad faith destroyed records of postal employees charged with misconduct similar to that alleged against Green. As a sanction, the court said that it would inform the jury that it could infer pretext from the destruction and would consider the same inference in ruling on a pending summary-judgment motion. The possible sanction was mooted, however, because in February 2013 the district court granted summary judgment for Defendant on the remaining claims. It ruled that Green's emergency placement was not a materially adverse employment action and that his constructive-discharge claim was time-barred because he had not contacted an EEO counselor about it within 45 days of December 16, 2009, when he signed the settlement agreement. Green appeals the disposition of all five claims.

II. DISCUSSION

A. Title VII Administrative Procedures

A brief summary of administrative procedures under Title VII will help set the stage. To avoid confusion when reading Title VII case law, it is worth noting that the obligations of federal employees are somewhat different from those of other workers. *See Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1311 (10th Cir. 2005). *See generally Laber v. Harvey*, 438 F.3d 404, 416-17 & n.9 (4th Cir. 2006). For private-sector employees, a charge of discrimination must be filed with the EEOC within 180 days, although the time can be extended to as much as 300 days if the claim is pursued initially with a state or local agency empowered to prosecute discriminatory employment practices. *See* 42 U.S.C. § 2000e-5(e)(1).[1] If the EEOC finds no discrimination or is unsuccessful at resolving the claim, the employee can then seek

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[1] The pertinent language of the paragraph is as follows:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred , except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier

42 U.S.C. § 2000e-5(e)(1).

judicial review. *See id.* § 2000e-5(f)(1). Federal employees, however, must begin the process by contacting within 45 days an EEO counselor in the employee's agency. *See* 29 C.F.R. § 1614.105(a)(1).[2] If the counselor does not resolve the matter, the employee can file a charge with the employing agency. *See id.* § 1614.106. Once the agency has investigated and issued a final decision, the employee can either appeal to the EEOC and then pursue judicial review, or opt out of further administrative proceedings and

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[2] Section 1614.105(a) states in full:

> Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.
>
> (1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.
>
> (2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

29 C.F.R. § 1614.105(a).

file directly in court. *See* 42 U.S.C. § 2000e-16(c); 29 C.F.R. §§ 1614.108-.110, 1614.401, 1614.407

B. Exhaustion

Before filing suit under Title VII, a private plaintiff must exhaust administrative remedies. "[E]ach discrete incident of alleged discrimination or retaliation constitutes its own unlawful employment practice for which administrative remedies must be exhausted." *Jones v. UPS, Inc* 502 F.3d 1176, 1186 (10th Cir. 2007) (internal quotation marks omitted). Two components of the exhaustion requirement are at issue in this case. The first relates to the content of the administrative charge. To establish exhaustion, a Title VII plaintiff must show that the claim is within the scope of the administrative investigation that could reasonably be expected to follow from the allegations raised in the charge. *See id.* Thus, "the charge must contain facts concerning the discriminatory and retaliatory actions underlying each claim." *Id.* Second, the plaintiff must submit the administrative charge in a timely fashion. *See Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1325-28 (10th Cir. 2002); *Johnson v. Orr*, 747 F.2d 1352, 1356-57 (10th Cir. 1984). Exhaustion serves the dual purposes of "protect[ing] employers by giving them notice of the discrimination claims being brought against them" and "providing the EEOC [or EEO office] with an opportunity to conciliate the claims." *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191, 1195 (10th Cir. 2004).

In this circuit the failure to comply with the first component of exhaustion deprives the court of

jurisdiction. *See Jones v. Runyon*, 91 F.3d 1398, 1399 (10th Cir. 1996) (Title VII claim by Postal Service employee). But the untimeliness of an administrative claim, although an exhaustion issue, *see Sizova*, 282 F.3d at 1327, is not jurisdictional, *see id.* at 1325.

Defendant filed a motion under Fed. R. Civ. P. 12(b)(1) to dismiss Green's first three claims – based on the letter notifying him of the investigative interview, the investigative interview itself, and the threat of criminal charges – for lack of jurisdiction because Green had not presented them administratively. The district court granted the motion. Defendant then moved for summary judgment on Green's constructive-discharge claim on the ground that it was untimely. The court granted that motion as well. The court based both rulings on undisputed facts regarding the content and timing of Green's administrative charges. Our review of both rulings is de novo. *See Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995) (dismissal for lack of jurisdiction); *Dahl v. Dahl*, 744 F.3d 623, 628 (10th Cir. 2014) (summary judgment). The district court's consideration of the administrative pleadings when ruling on the Rule 12(b)(1) motion was proper. *See Holt*, 46 F.3d at 1003 (court has "wide discretion" to consider documents "to resolve disputed jurisdictional facts under Rule 12(b)(1)"). We affirm the district court's rulings on exhaustion, but our reasoning differs from the district court's on the threat-of-criminal-charge claim.

1. Notice and Interview Claims

Green's charge submitted to the EEO Office on February 17, 2010, alleged retaliation and harassment on December 11, 2009, when he was removed from his position and placed on off-duty status. He contends that his claims based on the investigative interview and the letter notifying him of the interview were within the scope of that charge because the investigation into the charge would have included an investigation into the letter and the interview. We disagree.

The February 17 charge does not mention the letter at all, and the single reference to the interview is only that Smith "was not involved." Aplt. App., Vol. 1 at 60. Because the charge did not contain a description of the letter or the interview that would have caused the EEO Office to investigate them as separate instances of discrimination, the district court properly dismissed both claims.

2. Threat Claim

The analysis of Green's third claim – based on the threat of criminal prosecution – is a bit more complicated. The factual basis of the claim is contained in his April 23, 2010 charge. The charge alleges that he was constructively discharged by being forced to retire, and it states that the Postal Service intimidated him with a false threat of criminal charges. Green's unedited statement reads:

> Since filling my changes of discrimination the Agency has engaged in harassing, bulling and attempting to force me to quit or retire. I was forced out of my job as Postmaster Englewood,

> CO EAS-22, by Charmaine Ehrenshaft, or to move to the state of Wyoming about 400 miles from Denver, CO for a Postmaster position EAS-13 without save pay which would be a cut in pay of approximately $38,784.00 dollars and without any relocation cost. They also stopped my 2009, Pay-For-Performance Salary Increase that should have taken place in the month of January 2010. On December 19, 2009, Charmaine Ehrenshaft, downgraded me to an EAS-13 Postmaster Wamsutter, Wyoming. *They also used bulling, harassment, intimidation by possible criminal charges for delay of mail which I never delayed any mail in my Postal Career.*
>
> Alternatively, if I did not retire, a *Criminal Attorney* would cost me to start any where from $25,00.00 to $50,000.00, or if I did not retire, I was ordered to report to the Postmaster position in Wamsutter, Wyoming which is approximately 400 miles from Denver, CO, and be downgraded from a level EAS-22 to a level EAS-13, <u>without saved pay</u>.

Id. at 78 (italics added, bold omitted).

In a later communication, however, Green's attorney limited the charge. About two weeks after Green filed the April 23 charge, the EEO Office sent him a letter accepting his complaint for investigation and stating that the investigation would include only the following issues: (1) that he was forced to retire (constructive discharge), (2) that he was downgraded from a level 22 postmaster to a level 13 postmaster,

and (3) that his pay-for-performance salary increase was stopped. Green's attorney responded with a letter advising that "the only issue that should be investigated by you is the constructive discharge claim." *Id.* at 83. The EEO Office then issued a second acceptance letter acknowledging Green's request and identifying the constructive-discharge claim as the only claim it would investigate. Thus, Green's attorney took the opportunity to correct the EEO Office's erroneous inclusion of two claims not being raised, yet made no mention that another claim had been omitted. The obvious inference is that the charge had not raised any other claims. *See Velazquez-Ortiz v. Vilsack*, 657 F.3d 64, 72 (1st Cir. 2011). As a general rule, we have liberally construed administrative pleadings, *see UPS*, 502 F.3d at 1186 (EEOC filing); but that practice is limited to pleadings filed without the assistance of counsel, *see Lyons v. England*, 307 F.3d 1092, 1104 (9th Cir. 2002) ("We are required to construe appellants' EEOC charges with utmost liberality since they are made by those unschooled in the technicalities of formal pleading." (internal quotation marks omitted)); *Mitchell v. City & Cnty. of Denver*, 112 F. App'x 662, 667 (10th Cir. 2004) ("This more lenient pleading standard contemplates the fact that administrative charges . . . are regularly filled out by employees who do not have the benefit of counsel."); *cf. Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." (citations and internal quotation marks omitted)).

Nevertheless, the charge may have been adequate. Exhaustion depends on whether "the charge . . . contain[s] facts concerning the discriminatory and retaliatory actions underlying [the] claim." *Jones*, 502 F.3d at 1186. And the April 23 charge certainly contains facts concerning the alleged threat of criminal prosecution. Green did not necessarily withdraw his factual allegations when he withdrew all his claims other than constructive discharge; he may have based that claim in part on any discriminatory act against him, including the alleged threat of prosecution. Hence, we are reluctant to affirm dismissal of this claim on the ground that it was not included in his charge.

Green's escape from dismissal, however, is short-lived. The claim was untimely. Under 29 C.F.R. § 1614.105(a)(1), a federal employee "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." It is undisputed that the alleged threat of criminal prosecution occurred in December 2009. The March 2010 consultation was well past the 45-day deadline.

3. Constructive-Discharge Claim

"Constructive discharge occurs when an employer unlawfully creates working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign." *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1133 (10th Cir. 2013) (internal quotation marks omitted). Green claims that harassment and bullying by the Postal

Service forced him to retire. The district court, however, held that the claim was time-barred because all the allegedly discriminatory actions occurred by December 16, 2009, so his March 22, 2010 contact with the EEO office about his constructive discharge was beyond the 45-day deadline of 29 C.F.R. § 1614.105(a)(1). We agree with the district court.

Green argues that the 45-day limitations period did not begin to run until he announced his resignation, even though that was well after the last alleged discriminatory act against him. In our view, however, the start of the limitations period for constructive-discharge claims is the same as for other claims of discrimination.

To reach that conclusion, we begin by reviewing the rationale behind recognition of constructive discharge as a distinct claim. The chief function of such a claim is to expand the remedies available to an employee subjected to improper employer conduct. Ordinarily, an employee who quits a job after employer misconduct is treated as having voluntarily left the employment and is not entitled to reinstatement or to damages, such as back pay, resulting from having left the job. *See Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1236-37 (10th Cir. 2000) (employees who resigned after being sexually harassed were not entitled to back or front pay because they had not been constructively discharged); *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 342 (10th Cir. 1986) ("[T]he remedies of back pay and reinstatement are not available . . . unless [the plaintiff] was constructively discharged."). But employers should not be able to escape such remedies simply by making the job so intolerable that the

employee resigns, making it unnecessary to fire him. *See* 1 Barbara T. Lindemann et al., Employment Discrimination Law 21-33 (5th ed. 2012) ("An employer . . . should not be able to accomplish indirectly what the law prohibits being done directly."). To deal with that circumstance, various tribunals have embraced the concept of constructive discharge. Apparently the first to do so was the National Labor Relations Board (NLRB) in the 1930s in the context of alleged unfair labor practices. *See Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004). If there had been a constructive discharge, the NLRB could order reinstatement and backpay, remedies otherwise available only if the worker had been fired. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 888, 902 (1984) (holding that NLRB could order reinstatement with back pay as a remedy for constructive discharge); *In re Sterling Corset Co., Inc.*, 9 N.L.R.B. 858, 871 (1938) (ordering reinstatement and back pay as a remedy for constructive discharge). Courts have since recognized constructive-discharge claims in a variety of contexts, including Title VII, to enhance damages. *See Suders*, 542 U.S. at 142. Courts treat "a constructive discharge [as] functionally the same as an actual termination *in damages-enhancing respects*." *Id.* at 148 (emphasis added).

But when should a constructive-discharge claim accrue? For most federal limitations periods, "the clock starts running when the plaintiff first knew or should have known of his injury." *Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174, 1176 (10th Cir. 2011). In the employment-discrimination context, "this rule generally means that a claim accrues when the

disputed employment practice – the demotion, transfer, firing, refusal to hire, or the like – is first announced to the plaintiff." *Id.* at 1177. Unlike formal discharges, however, "[a] constructive discharge involves *both* an employee's decision to leave and [the employer's] precipitating conduct." *Suders*, 542 U.S. at 148 (emphasis added). This feature creates interesting issues regarding when such a claim accrues, and hence when a claim is untimely.

The interesting issue here is whether the date of accrual can be postponed from the date of the employer's misconduct until the employee quits or announces his future departure. Supporting such postponement is that quitting is an element of the claim, *see Mac's Shell Serv., Inc. v. Shell Oil Prods. Co.*, 559 U.S. 175, 184 (2010) ("To recover for constructive discharge, . . . an employee generally is required to quit his or her job."), and generally a claim does not accrue before all its elements can be satisfied, *see Wallace v. Kato*, 549 U.S. 384, 388 (2007) ("[I]t is the standard rule that accrual occurs when the plaintiff has a complete and present cause of action." (brackets and internal quotation marks omitted)).

Few court opinions have discussed the issue, either under Title VII or in other contexts. Of these, it appears that the majority have said that the constructive-discharge claim accrued when the employee gave notice of departure. In most of these decisions, however, the court had no occasion to choose between the date of the employer's last misconduct and the employee's resignation announcement. *See, e.g., Jeffery v. City of Nashua*, 48 A.3d 931, 936 (N.H. 2012) (plaintiff unsuccessfully argued that claim

accrued on effective date of resignation, not when she gave notice of resignation); *Patterson v. Idaho Dept. of Health & Welfare*, 256 P.3d 718, 725 (Idaho 2011) (same); *Whye v. City Council*, 102 P.3d 384, 387 (Kan. 2004) (same); *Hancock v. Bureau of Nat'l Affairs, Inc.*, 645 A.2d 588, 590 (D.C. 1994) (same).

Still, in several decisions under Title VII, courts have said that a claim accrued on the date the employee resigned. *See Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998); *Young v. Nat'l Center for Health Servs. Research*, 828 F.2d 235, 237-38 (4th Cir. 1987). The reasoning in *Young* was as follows:

> [*T*]*he applicable administrative deadlines run from the time of the discriminatory act*, not from the time of a later, inevitable consequence of that act. Whether an employer's action is a "discriminatory act" or merely an "inevitable consequence" of prior discrimination depends on the particular facts of the case. A resignation is not itself a "discriminatory act" if it is merely the consequence of past discrimination, but *if the employer discriminates against an employee and purposely makes the employee's job conditions so intolerable that a reasonable person would feel forced to resign, then the resignation is a constructive discharge – a distinct discriminatory "act" for which there is a distinct cause of action.*

828 F.2d at 237-38 (emphasis added) (citations omitted); *accord Draper*, 147 F.3d at 1110-11 (quoting *Young*); *Flaherty*, 235 F.3d at 138 (quoting *Young* and saying that cause of action accrued when employee gave notice of intent to retire).

Perhaps these decisions of our sister circuits could be distinguished on the ground that the last act of discrimination was within the limitations period. But in any event, we cannot endorse the legal fiction that the employee's resignation, or notice of resignation, is a "discriminatory act" of the employer. Such a fiction stretches the language of 29 C.F.R. § 1614.105(a)(1) too far. The regulation provides that federal employees "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action,[3] within 45 days of the effective date of the action." *Id.* And the Supreme Court has said that "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (internal quotation marks omitted). "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* at 257. Of particular concern is that delaying accrual past the date of the last discriminatory act and setting it at the date of notice of resignation would run counter to an essential

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[3] We are uncertain of the meaning of *personnel action* in the regulation, but we have no doubt that it must refer to the acts of the employer, not the employee, and Green has not suggested that his notice of resignation was a personnel action under the regulation.

feature of limitations periods by allowing the employee to extend the date of accrual indefinitely, thereby "placing the supposed statute of repose in the sole hands of the party seeking relief." *Wallace*, 549 U.S. at 391. As previously noted, the Supreme Court has stated that "a constructive discharge is functionally the same as an actual termination in *damages-enhancing respects*." *Suders*, 542 U.S. at 148 (emphasis added). It does not follow, however, that it should be treated as the functional equivalent for purposes of the limitations period.

No policy reason, certainly not the policy behind recognition of constructive-discharge claims as a means to provide appropriate relief to employees, commends itself as a ground for postponing the accrual of constructive-discharge claims until the employee leaves work. Such postponement would be contrary to the proposition that "society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships." *Derr*, 796 F.2d at 342-43 (internal quotation marks omitted).

There is certainly merit to the view that the employee should have time to contemplate whether the employer's misconduct has become intolerable. But the employee need not raise the claim instantaneously. The limitations period provides time for contemplation. Indeed, the EEOC took this consideration into account in setting the 45-day limit for claims, despite arguments that more time was necessary "to reflect, secure advice, or realize the impact of a discriminatory action." 57 Fed. Reg. 12634,

12634 (Apr. 10, 1992). It is not our office to expand the time limits beyond what the EEOC has set.

We recognize that an employee cannot file suit before presenting a charge in administrative proceedings, and a constructive-discharge charge cannot be submitted before the employee quits his job. But exhaustion of a Title VII claim requires only that "the charge . . . contain facts concerning the discriminatory and retaliatory actions underlying [the] claim." *Jones*, 502 F.3d at 1186. The charge need not allege that the employee responded to the improper action by quitting. And an employee who later decides he cannot take it any longer and therefore quits his job could likely amend a timely charge to include an allegation of constructive discharge. *See* 29 C.F.R. § 1601.12(b) (permitting amendments).

We therefore agree with the courts that have required some discriminatory act by the employer within the limitations period. *See Mayers v. Laborers' Health & Safety Fund*, 478 F.3d 364, 367, 370 (D.C. Cir. 2007) (notice of resignation was within limitations period but no discriminatory act of employer was); *Davidson v. Ind.-Am. Water Works*, 953 F.2d 1058, 1059-60 (7th Cir. 1992) (same).[4]

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[4] The Seventh Circuit later described *Davidson* as agreeing with *Flaherty* and *Draper*. *See Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 334 (7th Cir. 2004) ("Like other circuits, we have held that the clock starts with the events that constitute a constructive discharge."). But *Cigan* held that the employee had not been constructively discharged, *see id.*, and it did not purport to overrule *Davidson*.

Green does not claim that the Postal Service did anything more to him after December 16, 2009, the day he signed the settlement agreement. He first initiated EEO counseling on his constructive-discharge claim on March 22, 2010, well beyond 45 days later. That was too late.

C. Emergency-Placement Claim

Finally, we consider the emergency-placement claim. The district court dismissed the claim on summary judgment. "We review the district court's grant of summary judgment de novo, applying the same standards that the district court should have applied." *Dahl*, 744 F.3d at 628 (internal quotation marks omitted). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P 56(a). "[W]e examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *Dahl*, 744 F.3d at 628 (internal quotation marks omitted).

Green claims that his emergency placement was retaliation for his protected conduct of filing his 2008 EEO charge (which alleged that the Postal Service discriminatorily denied him the Boulder postmaster position) and his 2009 charge (which alleged that the Postal Service retaliated against him for his 2008 charge). An employee who does not have direct evidence of retaliation may prove such a claim under the three-step framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Debord v. Mercy Health Sys. of Kan., Inc.*, 737 F.3d 642, 655 (10th Cir.

2013). The employee must first establish a prima facie case that the action taken by the employer was retaliation for protected conduct by proving "(1) that he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action." *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1212 (10th Cir. 2008) (internal quotation marks omitted). The challenged action is materially adverse if "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (internal quotation marks omitted). If the prima facie case is made, the burden shifts to the employer to respond with "legitimate, nonretaliatory reasons" for its actions. *Debord*, 737 F.3d at 655 (brackets and internal quotation marks omitted). If the employer does so, the burden shifts back to the employee to show that the employer's "stated reasons were pretextual." *Id.*

In granting Defendant summary judgment, the district court held that Green could not prove that his emergency placement was materially adverse. We disagree.

On appeal Defendant argues that the emergency placement was not materially adverse for several reasons: (1) Green does not "take issue" with the district court's determination that there is no evidence that the placement was materially adverse, Aplee. Br. at 40; (2) Green never missed a regular paycheck, so the emergency placement was equivalent to administrative leave, which has not been considered

materially adverse; and (3) Green does not dispute that the placement did not dissuade him from engaging in protected activities.

We are not persuaded. In our view, Green adequately preserved below and on appeal his claim that the placement was materially adverse. As for Defendant's second argument, it misses a key fact: Although Green did not miss a paycheck, he did not know that he would be paid when he was handed the letter notifying him of the emergency placement. The letter referred to the placement as "nonpay status," and said that the status would "continue until you are advised otherwise." Aplt. Appl, Vol. 3 at 600. Green later received his regular paycheck only because he agreed to a settlement with the Postal Service, a settlement that he may have been induced to accept so that he could be paid. Indeed, Knight testified as follows:

> Q. Why did you tell Mr. Podio that you would not pay [Green]?
>
> A. It's my right. If we're going to negotiate a settlement, that's a negotiation tool.

Id., Vol. 5 at 1022. As we have said, "Actions such as suspensions or terminations are by their nature adverse, even if subsequently withdrawn." *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1104 (10th Cir. 1998). We do not doubt that losing one's income could "dissuade[] a reasonable worker from making or supporting a charge of discrimination." *Somoza*, 513 F.3d at 1212 (internal quotation marks omitted); *see Coleman v. Donahoe*, 667 F.3d 835, 860 (7th Cir. 2012) (postal employee's placement "on unpaid off-duty

status" was an adverse employment action); *Scott v. Potter*, 182 F. App'x 521, 524 (6th Cir. 2006) (expressing "no doubt" that postal employee's emergency placement was an adverse employment action). The possibility that one could recover that income by caving to the employer's demands would not provide much comfort.

Finally, Green's admittedly continuing to engage in protected activities (such as filing more charges) after the emergency placement does not affect our conclusion. True, "the fact that an employee continues to be undeterred in his or her pursuit of a remedy . . . may shed light as to whether the actions are sufficiently material and adverse to be actionable." *Somoza*, 513 F.3d at 1214. But here the obvious consequence of the placement was to induce Green to settle on terms favorable to the Postal Service. And once he had settled (particularly after he decided to quit), there was little the Postal Service could do to retaliate against him for his subsequent claims of discrimination. More importantly, we look at the likely effect of the adverse action on a "reasonable worker." *Id.* at 1212 (internal quotation marks omitted). Green does not lose his claim just because he may be more resilient than most. We repeat that a reasonable worker would be deterred by cutting off his pay.

Whether Green can establish the other elements of his emergency-placement claim and what damages, if any, he may be entitled to ae unclear. Bu we leave that to the district court to decide in the first instance.

III. CONCLUSION

We AFFIRM the district court's dismissal of the claims based on the investigative-interview letter, the investigative interview itself, the threat of criminal charges, and the alleged constructive discharge. We REVERSE summary judgment for Defendant on the emergency-placement claim, and we REMAND for proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Civil Case No. 10-cv-02201-LTB-KMT

MARVIN GREEN,

Plaintiff,

v.

PATRICK R. DONAHOE, Postmaster General, United States Postal Service,

Defendant.

ORDER

This matter is before me on the Motion for Summary Judgment [Doc #90], filed by Defendant Patrick R. Donahoe, Postmaster General, United States Postal Service (the "Postal Service"). For the reasons stated below, I GRANT Defendant's motion.

I. Background

This case involves Plaintiff Marvin Green's retaliation claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The full background runs deep and wide, but only a brief recitation of the facts is necessary to resolve the instant motion. What follows is not subject to genuine dispute unless otherwise noted.

A

Plaintiff is an African-American man who began working for the Postal Service in 1973. He advanced

and obtained his first supervisory role in 1985. In 2002 Plaintiff was promoted to an EAS-22 level Postmaster at the Englewood, Colorado post office, which was in the Postal Service's Colorado/Wyoming district. He held this position until retiring on March 31, 2010.

In early 2008, Plaintiff applied for an EAS-24 Postmaster position in Boulder, Colorado. He was not hired. Upset, on July 11, 2008, Plaintiff contacted an Equal Employment Opportunity ("EEO") counselor, and on August 14, 2008, he filed a formal EEO complaint alleging that he had been discriminated against because of his race. He specifically alleged that Gregory Christ, who was Plaintiff's immediate supervisor from 2008 through July 2009 and who was responsible for selecting the Boulder Postmaster, had not hired Plaintiff because of his race. On November 7, 2008, Plaintiff requested a hearing before the Equal Employment Opportunity Commission. This complaint was ultimately resolved through a settlement.

On May 14, 2009, Plaintiff filed an informal EEO complaint alleging that Christ had again discriminated against him because of his race and that Christ had retaliated against him because of his prior EEO activity. Plaintiff alleged that Christ threatened, demeaned, and harassed him.

Plaintiff filed another informal EEO complaint on July 17, 2009. In it he alleged that Christ and Jarmin Smith, who replaced Christ as Plaintiff's immediate supervisor in July 2009, had discriminated against him because of his race and had retaliated against him because of his EEO activity related to the Boulder

Postmaster position. Plaintiff alleged that Christ and Smith threatened, demeaned, and harassed him.

By letter dated August 12, 2009, the Postal Service's EEO office informed Plaintiff that it had concluded processing his two informal complaints and that he could file a formal complaint.

B

In late November 2009, while at home, Plaintiff received a letter dated November 25, 2009, from Charmaine Ehrenshaft. Ehrenshaft has been the Postal Service's manager of labor relations for its Colorado/Wyoming district since August 2008. The letter instructed Plaintiff to appear for an investigative interview regarding allegations of non-compliance with the Postal Service's grievance procedures. As a Postmaster, Plaintiff had certain responsibilities with respect to handling employee grievances. Defendant alleges that Plaintiff was derelict in those duties. Specifically, from April 2009 through December 2009, Plaintiff and his post office chronically failed to comply with grievance procedures, which led to multiple adverse decisions against Postal Service management and to the Postal Service paying penalties and payouts to grievants. Ehrenshaft and David Knight, the manager of human resources for the Postal Service's Colorado/Wyoming district since June 2008, were also concerned that Plaintiff had intentionally delayed signing return receipts for grievances sent to him by the National Letter Carrier's Union ("NCLU"). On October 15, 2009, Knight was forwarded a congressional inquiry by Senator Mark Udall dated September 28, 2009, related to complaints

by the NCLU about Plaintiff to that effect. Defendant alleges that the purpose of the investigation and interview was to discuss these concerns.

On December 11, 2009, Ehrenshaft and Knight conducted the investigative interview. Plaintiff was represented at the interview by Robert Podio, a representative from the National Association of Postmasters. Knight asked Plaintiff about the grievance issues and intentionally delaying signing return receipts for grievances. He also asked Plaintiff about certain allegations that another Postal Service employee had levied against Plaintiff.

As Plaintiff's meeting with Knight and Ehrenshaft concluded, two agents from the Postal Service's Office of Inspector General ("OIG") entered the room. OIG is an independent branch of the Postal Service. OIG had initiated its own investigation into whether Plaintiff had intentionally delayed the mail. Knight had previously told an OIG agent that Knight would be interviewing Plaintiff on December 11, 2009, and that the agent could interview Plaintiff afterwards. Plaintiff's current attorney joined him for the OIG interview.

After the OIG interview, Knight and Ehrenshaft appeared. They gave Plaintiff an emergency placement letter to sign, which he did, thereby putting him on emergency placement effective immediately. The letter stated that Plaintiff was being placed in "off-duty status immediately" for the disruption of day-to-day postal operations. Knight ordered Plaintiff to surrender his Postal Service identification and cell phone and not to return to the Englewood post office.

Following the investigative interview and emergency placement, on December 12, 2009, Podio initiated negotiations with Knight to resolve the issues raised during the investigative interview. Through emails and phone calls, Podio, on Plaintiff's behalf, and Knight negotiated and reached a settlement agreement in which the Postal Service agreed not to pursue any of the issues discussed at the investigative interview if Plaintiff agreed to retire. On December 15, 2009, Knight sent Podio a draft settlement agreement, and Podio requested that certain changes be made. Ehrenshaft sent Podio a revised draft that same day.

On December 16, 2009, Plaintiff, Podio, and Knight signed a settlement agreement. By signing it, Plaintiff agreed to retire from the Postal service by March 31, 2010. Plaintiff submitted his retirement papers on February 9, 2010, and his retirement was effective March 31, 2010.

On February 17, 2010, Plaintiff filed a formal EEO complaint alleging that by putting him on emergency placement on December 11, 2009, Knight, Ehrenshaft, and Smith had retaliated against him for his prior EEO activity. On March 22, 2010, Plaintiff filed an informal EEO complaint in which he alleged that he had been constructively discharged by being forced to retire in retaliation for prior EEO activity. Plaintiff followed-up this informal complaint with a formal complaint on April 26, 2010, which made the same allegations.

C

Plaintiff then brought his dispute to this Court by filing suit on September 8, 2010. He asserted five

claims of retaliation under Title VII based on these five acts, respectively: (1) the investigative interview letter delivered to his home; (2) the investigative interview; (3) the threat of criminal prosecution for intentionally delaying the mail; (4) putting him on emergency placement; and (5) his constructive discharge by forced retirement.

On October 28, 2011, I dismissed Plaintiff's first three claims on the ground that Plaintiff had not exhausted his administrative remedies. *See* Doc #26. This left Plaintiff with his constructive discharge claim and his emergency placement claim, which were not at issue in that order. Defendant now moves for summary judgment as to those claims under Rule 56 of the Fed. R. Civ. P.

II. Standard of Review

Rule 56 provides that summary judgment "is appropriate only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Concrete Works of Colo., Inc. v. City & Cnty of Denver*, 36 F.3d 1513, 1516 (10th Cir. 1994) (quoting Fed. R. Civ. P. 56(c)); *see also Klen v. City of Loveland, Co.*, 661 F.3d 498, 508 (10th Cir. 2011)). A fact is material if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of fact is genuine if "there is sufficient evidence on each side so that a rational trier

of fact could resolve the issue either way." *Id.* (citing *Anderson*, 477 U.S. at 248). When applying this standard, I must view the evidence and draw all reasonable inferences therefrom in the light most favorable to Plaintiff as the nonmoving party. *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1124 (10th Cir. 2005).

As the moving party, Defendant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Adler*, 144 F.3d at 670-71. To meet this burden, he need not disprove Plaintiff's claims; rather, he must "simply point[] out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim." *Id.* If he meets this initial burden, the burden shifts to the nonmoving party, Plaintiff, to "set forth specific facts showing that there is an genuine issue for trial." *Anderson*, 477 U.S. at 256. Plaintiff may not rest upon his pleadings to do so. *Id.* He must instead "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Adler*, 144 F.3d at 671 (internal quotations omitted). "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.*

III. Discussion

Title VII proscribes retaliating against an employee because he "opposed" any practice made unlawful by Title VII, or because he "participated . . . in an investigation, proceeding, or hearing under this

subchapter." *See* 42 U.S.C. § 2000e-3(a); *see also Stover v. Martinez*, 382 F.3d 1064, 1070 (10th Cir. 2004).

A

Defendant argues that for a host of independent reasons, Plaintiff's constructive discharge claim cannot withstand summary. The first is that Plaintiff did not properly exhaust it. I agree.

1

A plaintiff must properly exhaust his administrative remedies before bringing suit under Title VII. *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1409 (10th Cir. 1997); *Khader v. Apsin*, 1 F.3d 968, 971 (10th Cir. 1993). This rule applies to "'each discrete incident' of alleged discrimination or retaliation" because each incident "constitutes its own 'unlawful employment practice' for which administrative remedies must be exhausted." *Martinez v. Potter*, 347 F.3d 1208, 1210 (10th Cir. 2003) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) ("[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.")). The requirement "serves to put an employer on notice of a violation prior to the commencement of judicial proceedings. This in turn serves to facilitate internal resolution of the issue rather than promoting costly and time-consuming litigation." *Id.* at 1211.

One component of properly exhausting a Title VII claim is that the plaintiff must have first consulted with an EEO counselor "prior to timely filing a complaint in order to try to informally resolve the matter." 29 C.F.R. § 1614.105(a)(1). Contact must have been initiated with the EEO counselor "within 45 days of the date of the matter alleged to be discriminatory." *Id.* "This and other deadlines have been construed as a statute of limitations and are thus[] subject to waiver, estoppel, and equitable tolling." *Baltazar v. Shineski*, 2011 WL 2607154, *4 (D. Colo. July 1, 2011) (citing *Beene v. Delaney*, 70 Fed. App'x 486, 490-91 (10th Cir. June 27, 2003); *Hanlen v. Henderson*, 215 F.3d 1336, 2000 WL 628205, *3 (10th Cir. May 16, 2000) (addressing the 45-day deadline)). Under *Martinez* and *Morgan*, then, "contact with an EEO counselor is required within 45 days of each discrete discriminatory action" because "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice." *Id.* (quoting *Martinez*, 347 F.3d at 1210 (citing *Morgan*, 536 U.S. at 114)).

Determining when the 45-day period began means marking the date the claim accrued. In employment discrimination cases, "a claim accrues when the disputed employment practice – the demotion, transfer, firing, refusal to hire, or the like – is first announced to the plaintiff." *Almond v. Unified School Dist.*, 665 F.3d 1174, 1176 (10th Cir. 2011) (citing *Del. State. Coll. v. Ricks*, 449 U.S. 250 (1980)). The Tenth Circuit has explained that this is so even when the consequences of an alleged discriminatory action are felt by the employee at a later date: "[W]hether the

adverse consequences flowing from the challenged employment action hit the employee straight away or only much later, the 'limitations period [ ] normally commence[s] when the employer's decision is made' and 'communicated' to the employee." *Id.* (quoting *Ricks*, 449 U.S. at 258). Or, "[p]ut differently, the 'proper focus' is on the time that the employee ha[d] notice of 'the discriminatory acts,' not 'the time at which the consequences of the acts became most painful.'" *Id.* And although the Tenth Circuit has not addressed the specific issue of when a constructive discharge claim accrues, it has held that constructive discharge claims "should not be treated differently from any other adverse employment decision." *Hulsey v. Kmart Inc.*, 43 F.3d 555, 558 (10th Cir. 1994).

2

The inquiry thus turns to determining when Defendant's allegedly retaliatory actions that form the basis of this claim were communicated to Plaintiff or when he had notice of them. There is no dispute that all of the acts occurred on or before December 16, 2009. *See* Pl.'s Am. Compl. Doc #20 at 107-20; *see also* Def.'s Mot. Ex. F at 5-7 (Plaintiff's response to interrogatory asking him to list the "Specific Acts of Retaliation alleged in the action;" all actions occurred before December 16, 2009). There also does not appear to be a dispute that the acts were announced to, communicated to, or otherwise known by Plaintiff on the day they occurred or, at the latest, by December 16, 2009. *See* Pl.'s Am. Compl. Doc #20 at 107-20; Def.'s Mot. Ex. 34 at 5-7. The allegedly retaliatory acts that Plaintiff claims forced him to retire culminated with the settlement agreement, specifically the terms

therein, to which Plaintiff agreed by signing on December 16, 2009. Under *Ricks* and *Almond*, then, this claim accrued, at the latest, on December 16, 2009. *See Almond*, 665 F.3d at 1176; *Ricks*, 449 U.S. at 259 (limitations period began running when employee was informed of the denial of tenure, not from the date last employed). It is further undisputed that Plaintiff first made contact with the EEO regarding this claim on March 22, 2010. This was well over 45 days later. Plaintiff therefore failed to meet the timely contact requirement.

In opposition, Plaintiff does not argue waiver, estoppel, or equitable tolling of the 45-day clock. Nor does he contend that he in fact did not have notice of the acts underlying this claim until sometime within the 45 days before his March 22, 2010, contact. Plaintiff instead asks me to hold that for the purposes of exhaustion, the accrual date for a constructive discharge claim is the date an employee resigned. He submits that under that rule, here, the accrual date would be February 9, 2010 (when Plaintiff identified and informed Defendant of his retirement date), or March 31, 2010 (his retirement date). In support, he cites three cases and appears to assert that in constructive discharge cases the Tenth Circuit uses the date of an employee's resignation as the accrual date. Plaintiff's reliance on the cases is misplaced.

He first cites *Sioux v. Target Corporation*, 2010 WL 2927373, *3-4 (W.D. Okla. July 22, 2010) (unpublished). The court there indeed held that an employee's constructive discharge claim accrued when she gave her employer definitive notice of her intent to retire. *Sioux*, however, does not compel the conclusion

that Plaintiff here timely contacted the EEO. The case is not binding. It is also is distinguishable. There the plaintiff submitted a form on December 11, 2003, notifying the defendant that she was resigning and that her last day would be December 19, 2003. *Id.* at *1. Here Plaintiff signed an agreement to retire by a certain date, the terms of which Plaintiff claims forced him to retire – that is, constructively discharged him. He knew of these terms (and agreed to them) on December 16, 2009. Nevertheless, were I to apply *Sioux*'s reasoning, I would still conclude that Plaintiff's constructive discharge claim accrued on December 16, 2010. This is because in *Sioux* the court concluded that the employee's constructive discharge claim accrued on the date she notified her employer of her resignation and not on her last day of work. *Id.* at *3-4. Plaintiff notified the Postal Service on December 16, 2009, that he was retiring by signing the settlement agreement that day. Moreover, *Sioux* predates and appears contrary to *Almond*. *See* 665 F.3d at 1176.

Plaintiff also cites *Fischer v. Forestwood Co., Inc.*, 525 F.3d 972 (10th Cir. 2008), and *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104 (9th Cir. 1998). *Fischer* did not address the accrual date of a constructive discharge claim. *See* 525 F.2d 972. *Draper* is not only non-binding, it appears contrary to *Almond*. Plaintiff offers nothing more than these three cases. He also addresses neither *Almond* nor *Ricks* despite the fact he asks me to repudiate them. I decline to do so.

Accordingly, I conclude that Plaintiff did not timely contact an EEO counselor regarding this claim; he therefore failed to properly exhaust it. Consequently, the claim cannot withstand summary

judgment. *See Baltazar*, 2011 WL 2607154, at *4; *DeWalt v. Meredith Corp.*, 288 Fed. App'x 484 (10th Cir. July 31, 2008) (unpublished); *see Montes v. Vail Clinic, Inc.*, 497 F.3d 1160 (10th Cir. 2007). As a result, I need not reach Defendant's remaining arguments for summary judgment of this claim. *See Griffin v. Davies*, 929 F.2d 550, 554 (10th Cir. 1991) ("We will not undertake to decide issues that do not affect the outcome of a dispute.").

B

Defendant similarly argues that for multiple reasons he is entitled to summary judgment as to Plaintiff's emergency placement claim, the first being that Plaintiff cannot establish the second element of a prima facie case of retaliation. Again I agree.

1

The *McDonnell Douglas* burden-shifting analysis applies to Plaintiff's claims. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Stover*, 382 F.3d at 1070. Under this scheme, Plaintiff has the initial burden of establishing a prima facie case of retaliation. *Stover*, 382 F.3d at 1070. Doing so shifts the burden to Defendant to produce a legitimate, nondiscriminatory justification for taking the disputed employment action. *Id.* at 1071. If Defendant so provides the burden oscillates back to Plaintiff to show that the proffered reason is a pretext for unlawful discrimination. *Id.* He may demonstrate pretext "by showing the employer's proffered reason was so inconsistent, implausible, incoherent, or contradictory that it is unworthy of belief." *Id.*

To establish a prima facie claim of retaliation, Plaintiff must show "(1) that he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action." *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1212 (10th Cir. 2008). The second element requires Plaintiff to establish "that a reasonable employee would have found the challenged action materially adverse – that is, that the action might 'dissuade[ ] a reasonable worker from making or supporting a charge of discrimination. . . .'" *Id.* at 1213 (quoting *E.E.O.C. v. PVNF, L.L.C.*, 487 F.3d 790, 803 (10th Cir. 2007) (quoting *Burlington Northern and Sante Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006))). Requiring the action to be materially adverse is designed "to separate trivial harms from actionable injuries because Title VII does not establish 'a general civility code for the American workplace.'" *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)). The term does not include "a 'mere inconvenience or an alteration of job responsibilities.'" *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1136 (10th Cir. 2005) (quoting *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 857 (10th Cir. 2000)). The allegedly retaliatory conduct "must produce an injury or harm." *Somoza*, 513 F.3d at 1212 (citing *Burlington Northern*, 548 U.S. at 67).

It is important to underscore that the "test for determining whether an action would have been considered material by an employee is an objective test, asking how a reasonable employee would have

interpreted or responded to the action." *Id.* at 1213. The Supreme Court adopted a reasonable employee standard "because '[a]n objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings.'" *Id.* (quoting *Burlington Northern*, 548 U.S. at 68-69).

2

I now apply these principles to the emergency placement. It is worth stating at the outset that this claim is based upon only the emergency placement, not any other allegedly retaliatory act. As a corollary, while mindful of the context in which it occurred, see *Somoza*, 513 F.3d at 1213, I hone my inquiry to whether the emergency placement might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Firstly, Plaintiff fails to sufficiently identify, much less establish, how the emergency placement harmed or injured him. Beginning with economic harm, Defendant submits evidence demonstrating that Plaintiff received his regular pay without interruption from the date of his emergency placement through his retirement on March 31, 2010. *See* Def.'s Mot. Ex. A (Ehrenhshaft Affidavit) 45, 46 (first paragraph numbered 46), and Attach. 17 (Plaintiff's pay records). Plaintiff does not argue otherwise; nor does he offer any evidence to that effect. *See Kirch v. Embarq Mgmt. Co.*, ___ F.3d ___, 2012 WL 6720670, *5 (10th Cir. 2012) ("In a summary judgment proceeding a party's assertion of undisputed facts is ordinarily credited by the court unless properly disputed by the

opposing party.") (emphasis added); *see* Fed. R. Civ. P. 56(e) ("If a party . . . fails to properly address another party's assertion of fact . . . , the court may . . (2) consider the fact undisputed for purposes of the motion. . . ."). The placement letter also states that Plaintiff would "remain on the rolls." Def.'s Mot. Ex. C Attach. 14.

To be sure, Plaintiff argues that he was nominally placed in off-duty status without pay and asserts that this "affects" an employee's employment status. This is unavailing. It does not raise a genuine issue of material fact as to whether he was actually paid. Defendant explains that while non-pay status is the default status for emergency placement the Postal Service may still decide to keep paying the employee, and it presents undisputed evidence that occurred here. *See id.* In fact, the emergency placement letter does not state that Plaintiff was placed in "non-pay status;" it states that Plaintiff was placed in "off-duty status" and that "the employee is returned to duty status when the cause for nonpay status ceases." Def.'s Mot. Ex. C Attach. 14 (emphasis added). Furthermore, the assertion that emergency placement in off-duty status without pay affects an employee's employment status is unsupported and conclusory. It is also insufficient to show a materially adverse action: to be materially adverse, an action must do more than just "affect" an employee.

I note that because Plaintiff remained employed while on emergency placement and continued receiving pay at his current salary until his retirement, his emergency placement was more akin to administrative leave with pay. Being placed on

administrative leave with pay, even to be investigated, does not constitute an adverse employment action. *See Joseph v. Leavitt*, 465 F.3d 87, 90 (2nd Cir. 2006); *Singletary v. Mo. Dep't of Corr.*, 423 F.3d 886, 889, 892 (8th Cir. 2005); *Peltier v. United States*, 388 F.3d 984, 986, 988 (6th Cir. 2004); *Breaux v. City of Garland*, 205 F.3d 150, 154-55, 158 (5th Cir. 2000). Plaintiff does not argue with this analogy or rule.

Plaintiff also does not argue or establish that the emergency placement resulted in some other economic harm or injury, such as a loss of benefits. He likewise fails to argue or show that the placement wrought any non-economic harm. He thus fails to establish that the placement caused any injury or loss. *See Somoza*, 513 F.3d at 1212 (the allegedly retaliatory conduct "must produce an injury or harm"); *see also Morrison v. Carpenter Tech. Corp.*, 193 Fed App'x 148, 154 (10th Cir. Aug. 22, 2006) (concluding that the plaintiff had failed to establish second prong of his retaliation claim in part because the action did not result in any economic harm to the plaintiff).

Secondly, there is no evidence that the emergency placement rose to the level of discipline necessary to be materially adverse. "Disciplinary proceedings, such as warning letters and reprimands, can constitute an adverse employment action." *Medina*, 413 F.3d at 1137. "A reprimand, however, will only constitute an adverse employment action if it adversely affects the terms and conditions of the plaintiff's employment – for example, if it affects the likelihood that the plaintiff will be terminated, undermines the plaintiff's current position, or affects the plaintiff's future employment opportunities." *Id.* Plaintiff does not

establish that any of these occurred as a result of the emergency placement; nor does he submit evidence to that effect.

Defendant also submits evidence that emergency placement in off-duty status is not even considered a disciplinary action, that it does not affect the employee's employment status, and that Plaintiff's emergency placement letter was never placed in Plaintiff's personnel file. *See id.* (concluding that an employer's warning letter to an employee fell short of materially adverse in part because the letter was not placed in the employee's personnel file and because the plaintiff did not demonstrate that her subsequent employer – or any subsequent employer – had discovered or could discover the letter in the future). The emergency placement letter itself suggests that the placement was not discipline. It states that Plaintiff would "remain on the rolls" and that "[u]se of these emergency procedures *does not preclude disciplinary actions* based upon the same conduct." Def.'s Mot. Ex. C Attach. 14 (emphasis added). Plaintiff responds to this only by denying these facts and asserting that emergency placement in an off-duty status without pay "affects" the employees status, and he does not provide contrary evidence. *See* Pl.'s Resp. at 15 86. This is not enough. *See Elephant Butte Irr. Dist. ov New Mexico v. U.S. Dep't of Interior*, 538 F.3d 1299, 1305 (10th Cir. 2008) ("Under Fed. R. Civ. P. 56, a party opposing a motion for summary judgment 'may not rely merely on allegations or denials in its own pleading; rather, its response must . . . set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should,

if appropriate, be entered against that party.'") (quoting Fed. R. Civ. P. 56(e)(2)). He also ignores that the evidence establishes that he was in fact paid during the emergency placement.

Thirdly, it is undisputed the emergency placement *did not* preclude or otherwise dissuade Plaintiff from pursuing and engaging in protected activities during and after the placement. He went on to contact an EEO counselor and file a complaint concerning the emergency placement. "Thus, the alleged retaliation attempt [was] apparently [] unsuccessful." *Somoza*, 513 F.3d at 1214. While by no means dispositive, "the fact that an employee continues to be undeterred in his or her pursuit of a remedy, as was the case here, may shed light as to whether the actions are sufficiently material and adverse to be actionable." *Id.* (in case were the plaintiffs were not dissuaded by the defendant's alleged material and adverse retaliatory conduct, the court concluded that plaintiffs failed to show a materially adverse action).

Finally, Plaintiff's failure to argue and establish that the emergency placement was materially adverse goes beyond those specific ways discussed. In response to Defendant's motion, Plaintiff neither proffers nor directs the court to evidence that raises a genuine dispute of material fact as to whether the emergency placement was materially adverse. *See Nahno-Lopez v. Houser*, 625 F.3d 1279, 1283-84 (10th Cir. 2010) (opponent's response to summary-judgment motion must raise a factual dispute that is material to the motion). He instead offers mere conclusory and unsupported denials and quibbles with facts immaterial to that issue. *Compare* Def.'s Mot. at 16-18

84-98, *with* Pl.'s Resp. at 15-17 84-98; *see also Elephant Butte*, 538 F.3d at 1305. Furthermore, in its entirety, Plaintiff's argument in support of the second prong of the prima facie case is the following:

> *Adverse Action*
>
> Both the Agency's investigation and Green's emergency placement without pay were adverse actions. *Kulikowski v. Board of County Com's of City of Boulder*, 231 F. Supp. 2d, 153 (D. Colo. 2002) (a sham investigation is adverse action under Title IIV). Moreover a suspension without pay constitutes an adverse action. *See, Roberts v. Roadway Express, Inc.*, 149 F.3d 1098 (10th Cir. 1998).

Pl.'s Resp. at 36-37. This patently falls short-particularly in light of the undisputed evidence that Plaintiff was paid his full salary without interruption after the emergency placement.

It is worth reiterating that Plaintiff bears the burden of showing that a reasonable person would have found the emergency placement materially adverse. *Stover*, 382 F.3d at 1070; *Somoza*, 513 F.3d at 1212. Whether any one of the four considerations I have discussed would alone preclude the emergency placement from being materially adverse is a question I need not answer. When these considerations are aggregated, even when the facts and reasonable inferences therefrom are viewed in a light most favorable to Plaintiff, I conclude that Plaintiff fails to demonstrate that his emergency placement was a materially adverse action. Consequently, he has failed to discharge his burden of showing a prima facie case

of retaliation. The claim therefore cannot withstand summary judgment. As a result, I need not reach Defendant's other arguments. *Griffin*, 929 F.2d at 554.

C

I feel compelled to address an additional matter raised in the last two pages of Plaintiff's response. As explained, Plaintiff originally brought a claim alleging that Knight had retaliated against him by threatening criminal prosecution. *See* Doc #26 at 1. Pursuant to Defendant's motion to dismiss pursuant to Fed R. Civ. P. 12(b)(1), I dismissed this claim on the ground that Plaintiff had not exhausted it. *See id.* Now, in the final two pages of his response, Plaintiff "moves" that I reinstate it. Pl.'s Resp. at 43-44. The Local Rules of the District of Colorado provide that "[a] motion shall not be included in a response or reply to the original motion. A motion shall be made in a separate paper." D.C. COLO. LCivR 7.1.C. I thus deny Plaintiff's request. *See, e.g.*, *Shepherd v. Liberty Acquisitions*, LLC, 2012 WL 2673101, *1 n.1 (D. Colo. 2012); *Precision Fitness Equip., Inc. v. Nautilus, Inc.*, 2009 WL 3698525, *4 (D. Colo. Nov. 4, 2009) (unpublished).

D

A final issue should be addressed. The parties understandably spend much time on other aspects of Plaintiff's claims, including whether Plaintiff establishes a prima facie case of retaliation for his constructive discharge claim and whether he can show the third prong of the prima face case for his emergency placement claim. Indeed, pursuant to my January 24, 2013, order [Doc #128], at trial, a jury would be instructed that there is evidence of pretext. But, as the parties recognize, analytically, these issues are all continent upon and follow those that I have decided. To rule on this motion, I need not assess

whether the parties have met their respective burdens under the *McDonnell Douglas* framework as to Plaintiff's constructive discharge claim if, as I have determined, Plaintiff did not exhaust the claim. Nor must I consider whether Plaintiff has shown the third element of the prima facie case for his emergency placement claim or has shown pretext it, as happened here, Plaintiff failed to establish the second element. Two consequences flow from this: First, I decline to consider these issues because "[I] will not undertake to decide issues that do not affect the outcome of a dispute." *Griffin*, 929 F.2d at 554. Second and more importantly, these facts, and any dispute over them, do not preclude summary judgment. *Concrete Works*, 36 F.3d at 1516 ("Summary judgment is appropriate only if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.") (citing Fed. R. Civ. P. 56(c)) (emphasis added); *Adler*, 144 F.3d at 670 ("An issue fact is 'material' if under the applicable substance law it is essential to the proper disposition of the claim.") (emphasis added).

IV Conclusion

For the reasons set forth above, IT IS ORDERED that Defendant's Motion for Summary Judgment [Doc #90] is GRANTED, this action is DISMSSED, and Defendant is awarded costs.

Date: February 4, 2013 in Denver, Colorado.

BY THE COURT:

s/ Lewis T. Babcock

LEWIS T. BABCOCK, JUDGE

No. 14-613

In the Supreme Court of the United States

MARVIN GREEN, PETITIONER

v.

PATRICK R. DONAHOE, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's constructive-discharge claim under Title VII of the Civil Rights Act of 1964 was time-barred under 29 C.F.R. 1614.105(a)(1), which requires an aggrieved person to "initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory."

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 760 F.3d 1135. The opinion of the district court (Pet. App. 28a-50a) is not published in the *Federal Supplement* but is available at 2013 WL 424777.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2014. On October 6, 2014, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 26, 2014. The petition was filed on November 25, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 that applies to the pri-

vate sector, it is an "unlawful employment practice" for an employer to discriminate against employees or applicants who oppose practices that Title VII makes unlawful, or who participate in proceedings, investigations, or hearings involving charges of discrimination. 42 U.S.C. 2000e–3(a). Although that provision has not itself been incorporated into the federal-sector provisions of Title VII, courts have construed Title VII as extending the private-sector ban on retaliation to federal employers. See, *e.g.*, *Taylor* v. *Solis*, 571 F.3d 1313, 1320 (D.C. Cir. 2009); cf. *Gomez-Perez* v. *Potter*, 553 U.S. 474, 488 n.4 (2008) (reserving the question).

Before filing a suit in district court alleging a Title VII violation, a federal agency employee is required to exhaust administrative remedies. 42 U.S.C. 2000e–16(c). To initiate the administrative process, the employee must "initiate contact" with an equal employment opportunity (EEO) counselor at his or her agency "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1).

2. Petitioner is a black man who was employed by the United States Postal Service from 1973 until 2010. Pet. App. 3a. Beginning in 2002, he served as the postmaster in Englewood, Colorado. *Ibid.* In 2008, he applied for a postmaster position in Boulder, Colorado, but he was not selected for the job. *Ibid.* He then filed a formal charge with the Postal Service's EEO office alleging discrimination on the basis of race. *Ibid.* Petitioner and the agency settled that matter, but in May and July 2009, he filed informal EEO charges alleging that he had been retaliated against because of his EEO activity. *Ibid.* After an investigation, the Postal Ser-

vice informed petitioner that he could file a formal charge, but he did not do so. *Id.* at 3a-4a.

In November 2009, the Postal Service directed petitioner to appear for an investigative interview to discuss allegations that he had not complied with agency procedures when processing subordinate employees' grievances, which had resulted in adverse decisions requiring the Postal Service to pay damages and penalties. Pet. App. 4a. Petitioner, accompanied by his representative from the National Association of Postmasters, appeared at the interview on December 11, 2009, which was conducted by David Knight, the human-resources manager for the Postal Service's Colorado/Wyoming district, and Charmaine Ehrenshaft, the district's manager of labor relations. *Id.* at 4a, 30a. Petitioner was asked, *inter alia*, about allegations that he had intentionally delayed the mail by failing to timely sign and return receipts for certified letters relating to the grievances. *Id.* at 4a, 31a. After that interview, petitioner met with two agents from the Postal Service Office of Inspector General, which had begun an independent investigation of the potentially criminal allegations that petitioner had intentionally delayed the mail. *Id.* at 4a-5a, 31a. Immediately after petitioner's meeting with the agents, Knight and Ehrenshaft gave petitioner a letter informing him that, under the agency's emergency-placement policy, he was being immediately removed from duty because of his disruption of "day-to-day postal operations." *Id.* at 5a, 31a. The letter further stated that he would be returned to duty "when the cause for nonpay status ceases." *Id.* at 5a.

The next day, petitioner's representative initiated negotiations with Knight to resolve the issues that had

been raised in the investigative interview. Pet. App. 5a, 32a.

On December 16, 2009, the settlement negotiations concluded. Pet. App. 5a, 32a. In an agreement signed that day by petitioner, by his representative, and by Knight, the Postal Service agreed that it would not pursue any charges against petitioner based on the issues discussed during the December 11, 2009 interview. C.A. App. 610. In return, petitioner agreed that he would "immediately relinquish" his level-22 position as the postmaster in Englewood and accept a demotion to a lower-paying level-13 postmaster position in Wyoming. *Ibid.* The agreement also provided that petitioner would receive "saved salary" (*i.e.*, at the higher rate of pay associated with his former position) until March 30, 2010, and that he would be allowed to use annual leave and then sick leave during the period running from December 14, 2009, until March 31, 2010. *Ibid.* Finally, the agreement provided as follows:

> Mr. Green agrees to retire from the Postal Service no later than March 31, 2010. Mr. Green agrees to take all necessary steps to effect his retirement on or before March 31, 2010. If retirement from the Postal Service does not occur Mr. Green will report for duty in Wamsutter, Wyoming on April 1, 2010 and the saved salary shall immediately cease.

Ibid. As contemplated by the agreement, petitioner began using annual leave and sick leave (at full pay based on his prior position), and on February 9, 2010, petitioner submitted papers requesting that his retirement be made effective on March 31, 2010. Pet. App. 5a-6a.

Meanwhile, on January 7, 2010, petitioner had met with an EEO counselor and filed an informal charge

alleging that the Postal Service had retaliated against him for his earlier EEO activities when it issued the emergency-placement letter and removed him from his Englewood position. Pet. App. 6a. Petitioner filed a formal charge of retaliation on February 17, 2010. *Ibid.* The agency EEO office ultimately dismissed petitioner's charge as precluded by the December 16, 2009 settlement agreement, and the Office of Federal Operations at the Equal Employment Opportunity Commission (EEOC) upheld that dismissal. *Ibid.*

On March 22, 2010, however, petitioner contacted an EEO counselor and filed another informal charge, this time alleging that he had been constructively discharged. Pet. App. 6a, 32a. Petitioner filed a formal charge making that allegation on April 23, 2010. *Id.* at 6a. The agency EEO office dismissed petitioner's charge "for failure to state a claim, for constituting a collateral attack on a settlement agreement, and for stating the same claim" that had already been decided by the agency and the EEOC. C.A. App. 88.

3. On September 8, 2010, petitioner filed this suit in district court. Pet. App. 7a, 32a. In his amended complaint, petitioner alleges five counts of retaliation in violation of Title VII on account of his prior EEO activity, including his constructive discharge by forced retirement. *Id.* at 7a, 32a-33a. The district court granted the Postal Service's motion to dismiss three claims that are no longer at issue. *Id.* at 33a; Pet. 9.

As relevant here, the district court granted summary judgment to the Postal Service on petitioner's remaining two claims, including the one for constructive discharge. Pet. App. 33a-50a. The court held that petitioner's constructive-discharge claim accrued no later than December 16, 2009, the date of the settlement

agreement. *Id.* at 37a-40a. The court noted that petitioner did not allege that the Postal Service had engaged in any retaliatory acts after that date, and that the agency actions that petitioner alleged forced him to retire had culminated with the signing of the settlement agreement. *Id.* at 37a. The court acknowledged precedent cited by petitioner holding that a constructive-discharge claim accrues when the employee provides "definitive notice of her intent to retire." *Id.* at 38a. But the court concluded that petitioner's claim would fail even under that standard, because petitioner "notified the Postal Service on December 16, 2009, that he was retiring by signing the settlement agreement that day." *Id.* at 39a.

Separately, the district court granted summary judgment to the Postal Service on petitioner's emergency-placement claim on the ground that the placement was not a materially adverse action. *Id.* at 40a-48a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-27a.

a. The court of appeals affirmed the district court's grant of summary judgment to the Postal Service on petitioner's constructive-discharge claim. Pet. App. 15a-23a. The court concluded that petitioner's claim was untimely because all of the allegedly discriminatory or retaliatory acts occurred on or before December 16, 2009, and he did not initiate his administrative complaint within 45 days of that date. *Id.* at 16a.

After discussing the genesis and history of constructive-discharge claims, the court of appeals noted that, because such a claim "'involves *both* an employee's decision to leave and [the employer's] precipitating conduct,'" it "creates interesting issues regarding when

such a claim accrues, and hence when it is timely." Pet. App. 18a (quoting and adding emphasis and bracketed language to *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 148 (2004)). The court recognized that, to the extent that a constructive-discharge claim requires the employee to have quit, that counsels in favor of having the statute of limitations run from the date on which "the employee quits or announces his future departure." *Ibid.*

The court of appeals noted that "[f]ew court opinions have discussed the issue, either under Title VII or in other contexts," though it acknowledged that most of the courts that have discussed the issue have "said that the constructive-discharge claim accrued when the employee gave notice of departure." Pet. App. 18a. The court identified other circuits that had held—as petitioner had argued—that a constructive-discharge claim accrues "on the date the employee resigned." *Id.* at 19a. It suggested that those decisions could "[p]erhaps * * * be distinguished on the ground that the last act of discrimination [by the employer] was within the limitations period." *Id.* at 20a. In any event, the court concluded that it could not "endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer" for purposes of the limitations period defined in 29 C.F.R. 1614.105(a)(1). Pet. App. 20a. Relying on this Court's decision in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), the court of appeals explained that "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." Pet. App. 20a (quoting and omitting brackets from *Ricks*, 449 U.S. at 258). The court expressed "particular concern" that "delaying

accrual past the date of the last discriminatory act and setting it at the date of notice of resignation would run counter to an essential feature of limitations periods by allowing the employee to extend the date of accrual indefinitely." *Id.* at 20a-21a. Accordingly, the court "agree[d] with the courts that have required some discriminatory act by the employer within the limitations period." *Id.* at 22a.

Because petitioner "does not claim that the Postal Service did anything more to him" after he signed the settlement agreement on December 16, 2009, and he did not initiate EEO counseling on his constructive-discharge claim until March 22, 2010, "well beyond 45 days later," the court of appeals concluded that he had not timely exhausted that claim. Pet. App. 23a.

b. The court of appeals separately reversed the grant of summary judgment on petitioner's emergency-placement claim. Pet. App. 23a-26a. In the court's view, petitioner could establish that his placement on emergency off-duty status was materially adverse because, when he received notice of that action, he did not know that he would ultimately be paid. *Id.* at 25a. Because it was "unclear," however, whether petitioner could "establish the other elements of his emergency-placement claim," the court remanded to the district court for further proceedings on that claim. *Id.* at 26a.

ARGUMENT

Petitioner contends (Pet. 11-27) that this Court should resolve an alleged circuit conflict regarding when a constructive-discharge claim accrues under Title VII. In petitioner's view, five circuits have held that a constructive-discharge claim accrues when the employee gives definite notice of resignation (Pet. 11-15), while three other circuits have held that the limita-

tions period begins to run at the time of the last discriminatory act by the employer that gave rise to the resignation (Pet. 15-16). Review by this Court, however, would be premature, because the timing of those decisions has kept the lower courts from grappling with the potential differences between Title VII claims that involve (as in this case) discrete acts of discrimination and those that involve (as in nearly all of the cases in the majority of petitioner's alleged split) claims based on a hostile work environment.

Moreover, even if the question were otherwise ripe for this Court's review, this case would be a poor vehicle for its resolution for two independent reasons. First, petitioner's claim was untimely even under the rule he asks this Court to adopt, because, as the district court found, his own agreement to retire occurred more than 45 days before he initiated the EEO process alleging a constructive discharge. Second, his settlement with the agency (and retention of the consideration he received pursuant to that settlement) will prevent him from maintaining his claim on the merits. Further review is not warranted.

1. Petitioner asserts (Pet. 11) that the courts of appeals are "intractably split" over when a constructive-discharge claim under Title VII accrues for purposes of administrative exhaustion requirements. Petitioner contends that five circuits have held, in decisions dating between 1987 and 2000, that a constructive-discharge claim accrues on the date when an employee resigns or (if it is earlier) when the employee gives definite notice of his resignation. Pet. 11-14 (discussing *Flaherty* v. *Metromail Corp.*, 235 F.3d 133, 138-139 (2d Cir. 2000); *Draper* v. *Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998); *American Airlines, Inc.* v. *Cardoza-*

Rodriguez, 133 F.3d 111, 123 (1st Cir. 1998); *Hukkanen* v. *International Union of Operating Eng'rs*, 3 F.3d 281, 285 (8th Cir. 1993); *Young* v. *National Ctr. for Health Servs. Research*, 828 F.2d 235, 237-239 (4th Cir. 1987)). In petitioner's view, those decisions conflict with the decision below and with decisions of two other circuits, which require an employee to allege that the employer itself committed some discriminatory act during the limitations period. Pet. 15-16 (discussing *Mayers* v. *Laborers' Health & Safety Fund of N. Am.*, 478 F.3d 364, 370 (D.C. Cir. 2007) (per curiam); *Davidson* v. *Indiana-American Water Works*, 953 F.2d 1058, 1059 (7th Cir. 1992)).

a. Petitioner dismisses (Pet. 13-14) out of hand the court of appeals' suggestion that the decisions on which he relies "[p]erhaps * * * could be distinguished on the ground that the last act of discrimination was within the limitations period." Pet. App. 20a. Yet, with the exception of the First Circuit's decision in *American Airlines*, which is discussed further below, all of those cases involved allegations of what would now be called a hostile work environment,[1] and all of them were decided before this Court's decision in *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002).

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[1] See *Flaherty*, 235 F.3d at 138 (plaintiff alleged that a "series of acts by various of her supervisors" caused an "intolerable atmosphere"); *Draper*, 147 F.3d at 1110 (plaintiff resigned as a "result of the cumulative effect of [her supervisor's] repeated acts of discrimination"); *Hukkanen*, 3 F.3d at 284 (plaintiff "alleged that through various continuing actions [of her supervisor] spanning a two-year period, * * * the situation became so intolerable that she felt forced to resign"); *Young*, 828 F.2d at 238 (plaintiff alleged she had been subjected to "continual harassment" by her employer that led "to her feeling sick and feeling forced to resign").

In *Morgan*, the Court drew a distinction, for statute-of-limitations purposes, between claims that are based on discrete acts and those that are based on allegedly hostile work environments. 536 U.S. at 115. The Court explained that "[h]ostile environment claims are different in kind from discrete acts," because "[t]heir very nature involves repeated conduct" and they "are based on the cumulative effect of individual acts." *Ibid.* As a result, the statute-of-limitations rules that apply in the context of hostile-environment claims may not translate neatly to the different context of discrete-act claims. Thus, in *Morgan* itself, the Court concluded that, in the context of a discrete-act claim, an employee "can only file a charge to cover discrete acts that 'occurred' within the appropriate time period," *id.* at 114, but that, in the context of a hostile-environment claim, the employee may challenge the "*entire* hostile work environment" rather than just the acts that occurred within the limitations period, as long as "any act that is part of the hostile work environment" occurs within the limitations period, *id.* at 117-118 (emphasis added).

Petitioner's argument essentially requires the employee's act of resigning (or giving notice of his resignation) to be treated as the "discriminatory 'act'" in every constructive-discharge case. Pet. 11 (quoting *Young*, 828 F.2d at 238). But the rationale for using the date of notice of resignation in hostile-environment cases may not apply in other cases in which the constructive discharge is triggered by a discrete act, rather than the cumulative effect of a series of prior acts.

b. Tellingly, the only two cases in petitioner's alleged split that postdate *Morgan*—the decision below and the D.C. Circuit's decision in *Mayers*—did not apply petitioner's proposed rule in the context of dis-

crete discriminatory acts. See Pet. App. 20a-22a; *Mayers*, 478 F.3d at 368-369 (expressly relying on "limiting principles" from *Morgan*). When the D.C. Circuit considered the plaintiff's constructive-discharge claim in *Mayers*, it noted that it had "not yet had occasion to say whether, after *Morgan*, constructive discharge claims (like hostile work environment claims)" are "amenable to continuing violations analysis." *Id.* at 370. It assumed without deciding that they are, but still found the claim untimely because the plaintiff had not identified "one offending act within the statutory period." *Ibid.*

Moreover, the Seventh Circuit—the third court in the minority of petitioner's putative split—has indicated, since *Morgan*, that it sees no conflict between the two lines of cases that petitioner contrasts. In *Davidson*, *supra*, the Seventh Circuit held that there must be an adverse action by the employer in the relevant limitations period; it rejected the plaintiff's argument that her constructive-discharge claim accrued on the date she resigned because the limitations period "begins to run on the date that the defendant takes some adverse personnel action against the plaintiff." 953 F.2d at 1059. In a subsequent case, however, the court cited *Davidson* as well as *Flaherty* and *Draper*—the Second and Ninth Circuit's hostile-environment constructive-discharge cases—in support of its statement that "[l]ike other circuits, we have held that the clock starts with the events that constitute a constructive discharge." *Cigan* v. *Chippewa Falls Sch. Dist.*, 388 F.3d 331, 334 (7th Cir. 2004).

In addition, there is reason to question whether the Second Circuit itself would extend *Flaherty* beyond the hostile-work-environment context. In *Alleyne* v. *Amer-*

ican Airlines, 548 F.3d 219 (2d Cir. 2008), the court held that, although the plaintiff was discharged within the limitations period, his discrimination claim was time-barred "because the only alleged discriminatory *act* was [his] loss of seniority." *Id.* at 220. Because the plaintiff's "discharge was merely the delayed, neutral effect of alleged discrimination that took place outside the period of limitations," the court held that the claim was time-barred. *Id.* at 222.[2]

c. Nor is there even a square conflict between the decision below and those of the First Circuit. In *American Airlines*, *supra*—the sole case in petitioner's majority that did not involve a hostile-work-environment claim—the First Circuit considered claims that an employer "misled [the plaintiffs] into believing that they were faced with an impossible choice: retire with enhanced benefits or face termination when" certain operations were discontinued. 133 F.3d at 122. The court rejected the plaintiffs' argument that their claims did not accrue until they actually stopped working. *Id.* at 123. The court held that, "*at the latest*, the applicable statutes began to run when each employee accepted the [voluntary early retirement program]." *Ibid.* (emphasis added). Nevertheless, it pointedly failed to adopt a rule like the one that petitioner proposes, because it used the date on which each employee actually signed the

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[2] Although it did not involve a constructive-discharge claim, the Eighth Circuit's decision in *Tademe* v. *Saint Cloud State University*, 328 F.3d 982 (2003), noted that, under *Morgan*, discrete discriminatory acts are "not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 987 (quoting *Morgan*, 536 U.S. at 113). As a result, it could also ultimately conclude that its holding in *Hukkanen* does not extend beyond the hostile-work-environment context.

agreement to participate in the voluntary early retirement program, without accounting for the fact that the agreement expressly gave them another seven days during which they could rescind their participation. *Id.* at 114, 123. In other words, the First Circuit did not delay accrual until there was a definite or final retirement decision.

Moreover, the First Circuit's subsequent decision in *Jorge* v. *Rumsfeld*, 404 F.3d 556 (2005), indicates that it sees a distinction between constructive-discharge cases involving discrete acts and those involving a hostile work environment. While the court acknowledged that an employer's offer of early retirement *can* constitute a constructive discharge, it rejected the plaintiff's attempt to rely on the date of that offer because she did not allege that the offer itself had been discriminatory. *Id.* at 562. The court explained that a prior involuntary-transfer order had been the "last independent discriminatory act visited upon her." *Ibid.* Furthermore, *Jorge* expressly distinguished the Second Circuit's decision in *Flaherty* on the ground that the employee there had "continued, up to the date of her resignation, to suffer indignities attributable to a discriminatorily hostile work environment." *Id.* at 563 n.5.

d. Thus, notwithstanding the apparent age of the putative disagreement that petitioner identifies, there is no well-developed split in the courts below, in large part because nearly all of the cases predate this Court's decision in *Morgan*, which articulated distinctions between hostile-work-environment and discrete-act claims. The cases also precede *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004), on which petitioner relies for the "important" proposition that "'a constructive discharge involves *both* an employee's decision

to leave *and* precipitating conduct.'" Pet. 27 (quoting and adding emphases to *Suders*, 542 U.S. at 148). As a result, the lower courts have had no occasion to consider whether, in the wake of *Morgan* and *Suders*, an employee's own decision to leave should extend the accrual date of a claim that otherwise would have accrued when the employer engaged in precipitating conduct that involved discrete acts.

Regardless of whether petitioner's proposed rule or that of the decision below ultimately proves to be correct in the context of certain kinds of discrete-act claims, the paucity of cases that even present the question, and the almost-total lack of post-*Morgan* discussion about it—either by courts or by the EEOC[3]—demonstrates that review by this Court would be premature.

2. In any event, even if this Court's review of the question presented were otherwise appropriate at this time, petitioner himself would not prevail under the accrual standard he advocates, which depends on "the date when [the employee] gives 'definite notice' of his decision to leave." Pet. 2 (quoting *Flaherty*, 235 F.3d at 138). As petitioner acknowledges (Pet. 20), there is no

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[3] The EEOC amicus brief on which petitioner relies (Pet. 19) also predated *Morgan* (and involved a case in which the employee elected *not* to resign and was ultimately terminated). See EEOC Amicus Br., *Bailey* v. *United Airlines*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245 (filed Mar. 26, 2001). The only subsequent EEOC administrative decision that petitioner identifies (Pet. 19 n.6) involved a hostile-work-environment, not a discrete-act, claim. See *Complainant* v. *Shinseki*, EEOC Decision No. 0120141607, 2014 WL 3697473 (July 18, 2014). And there do not appear to be any EEOC decisions after *Morgan* addressing a constructive-discharge claim where an employee was given an option to retire.

practical difference between his proposed rule and that of the decision below "[i]n cases where the last act said to give rise to the resignation occurs on the same day as the resignation itself." Yet, that is precisely what happened in this case. As the district court held, even if the date of definitive notice of an intention to retire controls, that notice was given here when petitioner "notified the Postal Service on December 16, 2009, that he was retiring by signing the settlement agreement that day." Pet. App. 38a-39a.

Petitioner characterizes (Pet. 10) the December 16 settlement agreement as giving him "a choice between retirement and relocation to Wyoming." But that is not what the agreement said. Rather, it expressly provided that petitioner "*agrees to retire* from the Postal Service no later than March 31, 2010" and that petitioner "*agrees to take all necessary steps to effect his retirement* on or before March 31, 2010." C.A. App. 610 (emphases added). Although the next sentence of the agreement stated that petitioner would be required to "report for duty" in Wyoming on April 1 "[i]f retirement from the Postal Service does not occur," *ibid.*, it did not affirmatively give him an option to revoke his agreement to retire. Nor did it purport to allow petitioner to decide at some later point whether he would in fact retire. Instead, that last sentence merely provided for contingencies in which retirement did not happen by that date (whether because petitioner reneged on his agreement, or because, through someone else's fault, the retirement had not yet become final, or because of some other reason). The district court thus correctly concluded that petitioner's agreement to retire did in

fact occur on the date when he signed the page declaring that he "agree[d] to retire." *Ibid.*[4]

If petitioner were correct in maintaining that his initial agreement to retire was insufficiently definite, there would be little reason to use the subsequent date on which he actually "submitted his resignation" (Pet. 9), because he could just as well have sought to revoke *that* act at some point before April 1. And the same thing could be said in any case in which an employee agrees to resign on one date and makes his resignation effective at a later date. But, as petitioner concedes (Pet. 12), even the cases on which he relies have not adopted that approach. See also Pet. App. 18a-19a

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[4] The government introduced evidence that the human-resources manager who negotiated the agreement for the Postal Service understood "that [petitioner] would follow through on that agreement and would therefore not be reporting to the lower-level position." Gov't Mot. for Summ. J. 20 (D. Ct. Doc. 90). In response, petitioner relied only on the text of the agreement. See Pet. Resp. to Mot. for Summ. J. 18 (D. Ct. Doc. 106). In the court of appeals, petitioner assumed that the agreement permitted him to decide at a later date whether to retire, but he did not clearly attack the alternative ground for the district court's exhaustion holding. Instead, he identified certain parts of the district court's discussion as being "disputed" facts, but he did not include in his list the sentence stating that he gave notification of his retirement by signing the agreement. See Pet. C.A. Br. 50. The government's brief explained that, "[b]y signing" the agreement, petitioner "agreed to retire," Gov't C.A. Br. 27, though it also included other characterizations suggesting, without citing anything other than the agreement, that he agreed to retire "or accept [a] transfer," *id.* at 36, 44, 47. In light of its decision, the court of appeals did not need to (and did not purport to) address the factual determination underlying the district court's alternative holding, though it did characterize the settlement agreement as giving petitioner a choice about whether "to retire or to work in a position that paid much less." Pet. App. 2a; see *id.* at 5a.

(citing additional cases rejecting plaintiffs' requests to use the effective date of resignations as the trigger date). Indeed, in the *American Airlines* case that petitioner invokes (Pet. 13), the First Circuit held that "the latest" possible date for starting the limitations period was "when each employee accepted" the voluntary early retirement program—even though the agreement at issue there provided for "*a seven day rescission period* after an election to participate." 133 F.3d at 114, 123 (emphasis added). The court did not think it was necessary to wait for the rescission period to elapse before the employees had fully manifested their acceptance.

Thus, even if petitioner's settlement agreement were construed as containing an implicit rescission clause, his claim would still be barred by his December 16 agreement to retire. That alone provides sufficient reason to deny further review.

3. Finally, even assuming *arguendo* that petitioner's constructive-discharge claim were somehow found to be timely, this case would still be a poor vehicle for another reason: because his claim should be barred on the merits by the settlement agreement he reached with the agency.

When petitioner filed his EEO complaint challenging his emergency placement and demotion from his Englewood position, the agency dismissed that complaint on the ground that it was precluded by the settlement agreement, and the EEOC's Office of Federal Operations affirmed that rationale and the dismissal. Pet. App. 6a. The EEOC cited 29 C.F.R. 1614.504(a), which provides that "[a]ny settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties." C.A. App. 73. It further noted that petitioner

had "presented no evidence establishing that he did not knowingly and voluntarily enter into the settlement agreement." *Id.* at 74. The Postal Service also dismissed petitioner's EEO complaint alleging a constructive discharge, finding, *inter alia*, that it also "constitut[ed] a collateral attack on a settlement agreement." *Id.* at 88.

Here, petitioner is attempting to retain the benefits he received from the agreement (*e.g.*, more than three months of paid leave at the higher salary of his prior position and avoidance of potential discipline), while effectively reneging on the voluntary retirement to which he agreed when he signed the settlement. Petitioner has not offered to return the consideration received, nor has he alleged that the Postal Service breached the agreement. Thus, he has ratified the agreement and is bound by its terms, which are incompatible with a finding of constructive discharge. See *Harris* v. *Brownlee*, 477 F.3d 1043, 1047 (8th Cir. 2007) (settlement agreements, "including those entered into by the government" in the Title VII context, "are viewed in light of governing contract principles"; a plaintiff "is not entitled to rescission of a contract absent a material breach of the agreement"); *Brown* v. *City of S. Burlington*, 393 F.3d 337, 344 (2d Cir. 2004) ("[i]n order to avoid a finding of ratification where consideration has been paid, it is essential that the releasor tender back the sum received"); *Saksenasingh* v. *Secretary of Educ.*, 126 F.3d 347, 350 (D.C. Cir. 1997) (if district court in Title VII case finds that federal agency "did not breach the agreement, then the settlement will

bar [the plaintiff] from proceeding with her original [Title VII] claim").[5]

Any contrary finding would undermine Congress's "strong preference for encouraging voluntary settlement of employment discrimination claims" under Title VII. See *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). As this Court has emphasized: "[c]ooperation and voluntary compliance were selected as the preferred means for achieving" Congress's goal in enacting Title VII of "assur[ing] equality of employment opportunities." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). If plaintiffs could obtain the benefits of a settlement in the administrative process and then sue in court to obtain additional relief beyond the agreement's terms, agencies would have little incentive to settle Title VII claims. "Allowing one party to renounce an agreement and sue for additional relief would undermine [courts'] longstanding policy of encouraging settlement, thereby creating a disincentive to the amicable resolution of legal disputes and defeating the purposes of title VII." *Jackson* v. *Widnall*, 99 F.3d 710, 714 (5th Cir. 1996).

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[5] In the district court, the agency contended in relevant part that there was no constructive discharge because the settlement agreement established that petitioner had retired voluntarily. Gov't Mot. for Summ. J. 29. Because it found petitioner's constructive-discharge claim had not been properly exhausted, the district court did not reach this argument for summary judgment. Pet. App. 39a-40a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

PATRICK R. DONAHOE, Postmaster General, United States Postal Service,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

The Government's brief in opposition is most noteworthy not for what it affirmatively contends but for what it omits and concedes. The Government does not deny that five courts of appeals have held that the filing period for a constructive discharge claim begins when the employee resigns, and that three other courts of appeals, including the Tenth Circuit below, have rejected that view and start the filing period with the employer's last allegedly discriminatory act said to give rise to the resignation. *See* Pet. 11-16.

The Government does not dispute that the question presented is important and that its resolution by this Court would enable administrative agencies and courts nationwide to consistently determine the timeliness of the thousands of constructive discharge claims filed each year. *See* Pet. 16-18.

And perhaps most importantly, having urged the Tenth Circuit to adopt the rule that it thereafter adopted, the Government now does not even attempt to defend the Tenth Circuit's ruling on its merits. *See* Pet. 21-27. What is more, it does not deny that the EEOC has embraced the position taken here by petitioner. BIO 15 n.3; *see* Pet. 19, 27.

Rather than seek to weaken these traditional pillars of certworthiness, the Government says that review of the circuit split would be "premature" because future developments might reconfigure (but not eliminate) it. BIO 9. The Government also contends, based on legal and factual premises rejected by the court of appeals below, that this case is not a suitable vehicle for review. None of these arguments is persuasive, and the petition should be granted.

1. The Circuit Conflict Is Ripe For Review.

a. The Government does not deny that the existing five-to-three circuit conflict spans more than twenty-five years, beginning with the Fourth Circuit's ruling in *Young v. National Center for Health Services Research*, 828 F.2d 235, 238 (4th Cir. 1987), and extending to the decision below, which expressly rejected *Young* and its progeny. Pet. App. 19a-22a.

Nonetheless, the Government contends that review of this pedigreed conflict would be "premature" because the courts of appeals have not dealt with a supposedly pertinent distinction between constructive discharge claims that concern "discrete acts of discrimination," BIO 9, and others that "involve[] allegations of *what would now be called* a hostile work environment," BIO 10 (emphasis added). The Government's suggestion – that the courts of appeals have until recently been ignorant of the hostile work environment doctrine and its potential ramifications for the question presented – is flatly incorrect. This Court held that hostile work environment claims are actionable under Title VII nearly three decades ago, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), before *any* of the decisions that comprise the circuit split. *See also id.* at 65-66 (noting EEOC guidelines and a consistent body of lower-court case law embracing the hostile work environment doctrine dating from the early 1970's). And that the courts of appeals have been grappling with the question presented since 1987 and have never discovered the distinction suggested by the Government is testament to its implausibility.

The Government's prematurity argument is premised on its speculation that a constructive

discharge claim based on a single discrete act will someday have a different accrual date than one emerging from events that might constitute a hostile work environment. But such a system would be at war with sensible claim administration. In the world conjured by the Government, in every constructive discharge case, the decision maker – the EEOC or an agency official in the first instance – would have to discern whether or not the constructive discharge emerged from a hostile work environment, which "can be determined only by looking at all the circumstances." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). That type of fact-intensive inquiry would have to be conducted at the threshold of every constructive discharge case, even where the plaintiff had not pled a separate hostile work environment claim.

Moreover, though some constructive discharge claims may have their origins in a single discrete act of the employer, some will involve two or more discrete acts that allegedly led to the employee's resignation. Under the Government's view, in determining the proper filing period, the decision maker would have to ask whether, for instance, a three-act case should be treated like a hostile work environment case or a discrete-act case, or, perhaps, get different treatment altogether.

b. The Government seeks to buttress its claim of prematurity by noting that the decisions of six of the eight courts of appeals that have ruled on the question presented predate this Court's decision in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002). But *Morgan* does not help the Government. There, the Court considered when the filing period

begins for both hostile work environment claims and claims that are actionable only after particularized conduct has occurred. *Id.* at 110. Because of the "very nature" of a hostile work environment claim, *id.* at 115, the Court explained, the decision maker must consider a series of acts to determine when the filing period begins. *Id.* at 115-16.

But with respect to particularized claims, including those based on "termination," the Court emphasized that the statutory filing period begins to run at one point only: when the claim first becomes actionable. *Morgan*, 536 U.S. at 114. And a constructive discharge claim becomes actionable when the employee resigns. *Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004); *see* Pet. 3-4. Thus, *Morgan* underscores that the appropriate trigger date for the filing of a hostile work environment claim has no bearing on the trigger date for the filing of a constructive discharge claim. Pet. 23-24 (discussing *Morgan*).

c. The Government claims that post-*Morgan* developments in the courts of appeals prove its point that *Morgan* can be expected to alter the terrain. That is not correct.

In *Alleyne v. American Airlines, Inc.*, 548 F.3d 219 (2d Cir. 2008), for instance (*see* BIO 12-13), the employee was fired and later sued, claiming only a discriminatory loss of seniority, which the employee said could adversely affect her chances for rehire. The employee did not claim constructive discharge, and the Second Circuit did not even cite *Morgan*. The court simply held that because the employee's EEO claim was filed more than 300 days after the alleged loss of seniority, the claim was barred. Thus, contrary to the

Government's assertion, *Alleyne* does not call into question the continuing vitality of *Flaherty v. Metromail Corp.*, 235 F.3d 133 (2d Cir. 2000), which held that the filing period for constructive discharge begins when an employee gives "definite notice of her intention to retire" – a rule that, the court explained, "should be the same in *all cases* of constructive discharge." *Id.* at 138 (emphasis added).

The Government also contends that, in light of *Morgan*, the Seventh Circuit now "sees no conflict" in the courts of appeals. BIO 12. But its lone support is a single sentence in *Cigan v. Chippewa Falls School District*, 388 F.3d 331 (7th Cir. 2004), a case that did not concern limitations periods at all. *Cigan* simply noted that the filing period for a constructive discharge claim runs from the employer's prior acts that "constitute" it, *id.* at 334, which is perfectly consistent with the Seventh Circuit's position on the minority side of the circuit conflict. *See* Pet. 15 (discussing *Davidson v. Indiana-American Water Works*, 953 F.2d 1058, 1059 (7th Cir. 1992)).

The Government does not deny that *Hukkanen v. International Union of Operating Engineers*, 3 F.3d 281 (8th Cir. 1993), squarely held that the filing period for constructive discharge begins with the employee's resignation. Instead, the Government speculates (BIO 13 n.2) that the Eighth Circuit might someday conclude that *Hukkanen* applies only to constructive discharges accompanied by a hostile work environment. But the only case it cites, *Tademe v. Saint Cloud State University*, 328 F.3d 982 (8th Cir. 2003), was a straightforward application of *Morgan* to allegations based on both discrete personnel actions and a hostile work environment. *Id.* at 987-90. *Tademe* sheds no

additional light on how the Eighth Circuit views constructive discharge, which was not at issue or even mentioned in the decision. *Id.* at 984.

Finally, the Government concedes that in *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111 (1st Cir. 1998), the First Circuit measured the limitations period from the date each employee gave notice of resignation. BIO 13. The Government says that *Jorge v. Rumsfeld*, 404 F.3d 556 (1st Cir. 2005), "sees" the Government's *Morgan*-based distinction. BIO 14. But *Jorge* did not discuss *Morgan* and cited *American Airlines* approvingly. *Jorge*, 404 F.3d at 563. It held that neither an employer's lateral transfer nor a non-discriminatory offer of early retirement provided any substantive support for the employee's constructive discharge claim. *Id.* at 562. Thus, it declined to measure timeliness from the date the employee resigned, relying on this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250, 256-59 (1980), which significantly predates all of the cases comprising the circuit split. *Jorge*, 404 F.3d at 561-64. *See* Pet. 26-27 (discussing *Ricks*). To the extent that this conclusion is in tension with *American Airlines*, it only underscores the pressing need for this Court to provide guidance.

2. This Case Is An Ideal Vehicle For Resolving The Question Presented.

Neither of the two vehicle concerns posited by the Government is a genuine impediment to review.

a. The Government says that petitioner resigned by signing the December 16, 2009 agreement between petitioner and the Postal Service, and thus petitioner's EEO complaint was untimely no matter how the

question presented is resolved. BIO 16. Petitioner's option to resign by the end of March 2010, or, alternatively, to accept a postmaster position in Wyoming, was not an option at all, the Government says, but rather a counterproductive fail-safe aimed at authorizing petitioner to report to Wyoming and continue working for the Postal Service if *petitioner himself* "reneged on his agreement." BIO 16. (The Government also says that the Wyoming option might have become operative for "other reason[s]," BIO 16, but it does not specify what those reasons could have been.)

This view runs headlong into reality. In describing the relevant facts at the outset of its opinion, the Tenth Circuit explained that, under the agreement, petitioner was to be paid for several months "after which he could choose either to retire or to work in a position that paid much less and was about 300 miles away." Pet. App. 2a. The Government acknowledges this statement, but suggests that it was unnecessary to the Tenth Circuit's decision. BIO 17 n.4. That is not correct. The Tenth Circuit's lengthy analysis of the question presented, and its detailed review of the conflicting circuit-court authorities, Pet. App. 15a-23a, was not an elaborate exercise in futility, but rather reflects that its unambiguous understanding of the agreement mattered to the result.

The court of appeals began its legal analysis by noting that "[t]he interesting issue *here* is whether the date of accrual can be postponed from the date of the employer's misconduct until *the employee quits or announces his future departure*" and that "supporting such postponement is that quitting is an element of the [constructive discharge] claim." Pet. App. 18 (emphasis

added); *see also* Pet. App. 16 ("Green argues that the 45-day limitations period did not begin to run *until he announced his resignation.*") (emphasis added). The Tenth Circuit thus understood that if it had sided with petitioner's view of the law, the claim would have been timely, and if it sided with the Postal Service, the claim would be barred.[1]

But that is not all. The *Government itself* repeatedly took the same position below. Although the brief in opposition suggests that these were stray comments, BIO 17 n.4, in fact, they were central to the Government's defense of the constructive discharge claim. On at least seven occasions, the Government's Tenth Circuit brief emphasized that the agreement gave petitioner the option to leave the Postal Service by the end of March or transfer to Wyoming. It explained at the beginning of the brief that the "issue[] presented for review" was whether petitioner's complaint was timely "after he entered into a settlement agreement under which he would either accept a transfer or resign by March 31, 2010." Gov't CA10 Br. 1-2; *see id.* at 5 (same). Along the same lines, the Government maintained that it had not coerced petitioner into resigning through false threats of criminal prosecution because he could have "accepted the transfer to

---

[1] Although the court of appeals suggested that some of the conflicting circuit-court authority "perhaps . . . could be distinguished" on the ground that the issue may not have been outcome-determinative in those cases, Pet. App. 20a – a point rebutted in the petition (at 13-14) – it never remotely suggested the same was true in petitioner's case.

Wyoming that he had agreed to in the settlement agreement." *Id.* at 19.[2]

In sum, as the Tenth Circuit recognized, if the timeliness of petitioner's constructive discharge claim had been evaluated under the majority rule in the

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[2] *See also* Gov't CA10 Br. 36 (noting that, under the settlement agreement, "Mr. Green [was] to receive full salary, while relinquishing the Englewood postmaster position and agreeing to either retire or accept transfer to Wyoming"), 44 ("Mr. Green had agreed that by March 31 , 2010, he would either have to retire, or accept a transfer to Wyoming at a reduced salary."), 47 (same), 50 (same). The Government claims support in its Tenth Circuit brief from a statement that, under the agreement, petitioner "agreed to retire." BIO 17 n.4. But what the brief actually says is that petitioner agreed to retire "by March 31, 2010," Gov't CA10 Br. 27, an obvious reference to the option to transfer to Wyoming, particularly in light of the brief's repeated statements that the agreement provided that option.

Despite the Government's contrary suggestion, BIO 17 n.4, the Government's summary-judgment brief in the district court described the settlement agreement just as it later did in the Tenth Circuit. *See* CA10 App. 410 ("[O]nce Plaintiff signed the settlement agreement, Plaintiff still had the option of not retiring and instead transferring to the position in Wamsutter, Wyoming."), 411 (same).

Though the district court's summary-judgment opinion indicated that petitioner retired by signing the agreement, *see* BIO 16, the opinion made no mention of the agreement's text nor even of petitioner's demotion to the Wyoming position. Earlier, however, when it denied the Government's motion to dismiss the constructive discharge claim on inadequate-pleading grounds, the district court described the agreement as "mandat[ing] that by March 31, 2010, Plaintiff must either retire or transfer to a position 400 miles away in Wyoming." CA10 App. 24 (quoting July 12, 2011 order). In any case, the district court's view is irrelevant in light of the Tenth Circuit's ruling that petitioner in fact had the option, until March 31, 2010, to retire or assume the Wyoming position. Pet. App. 2a.

circuits, that claim would have been timely and thus heard on its merits.

b. The Government also maintains that this case is "a poor vehicle" because petitioner's constructive discharge claim "should be barred on the merits by the settlement agreement." BIO 18. That a particular claim might not survive on the merits after remand from this Court generally is not a reason to deny review on a threshold legal issue of national importance. In any case, that argument is particularly weak here.

First, the Government made – and lost – the same argument below. It contended that the agreement was a bar to petitioner's claim that his emergency placement was an adverse employment action. Gov't CA10 Br. 35-38. But the Tenth Circuit allowed petitioner's emergency-placement claim to go forward, noting that "the obvious consequence of the [emergency] placement was to induce Green to settle on terms favorable to the Postal Service." Pet. App. 26a. In light of this holding, it is highly unlikely that the Tenth Circuit on remand would view the agreement as a bar to petitioner's constructive discharge claim.

Second, the Government's argument rests on the inapposite assertion that agreements to settle *Title VII* complaints generally are not subject to attack in light of a preference for voluntary settlement of Title VII litigation. *See* BIO 18-20. But the agreement on which the Government relies here did not arise out of Title VII litigation. As the Tenth Circuit explained, it arose out of an investigation of petitioner in which, as a negotiating tactic, the Postal Service used the threat of criminal charges to coerce petitioner even after the

Postal Service determined that petitioner was not guilty of those charges. *See* Pet. App. 5a.

Nor did the agreement purport to settle *any* claims, present or future, let alone petitioner's later-filed Title VII constructive discharge claim, *see* CA10 App. 610, a point underscored by the Tenth Circuit's resolution of the emergency-placement claim. This fact distinguishes the three cases cited by the Government (BIO 19), which involved either suits simply to enforce Title VII settlements, *Harris v. Brownlee*, 477 F.3d 1043 (8th Cir. 2007); *Saksenasingh v. Secretary of Educ.*, 126 F.3d 347 (D.C. Cir. 1997), or an attack on a settlement agreement that expressly waived all future claims. *Brown v. City of S. Burlington*, 393 F.3d 337 (2d Cir. 2004). If the Government were right that the agreement here could act as an all-purpose litigation bar, defendants could avoid liability on the basis of earlier agreements induced by threats and motivated by racial, retaliatory, or other impermissible animus. That would be anathema to the Nation's antidiscrimination laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

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March 31, 2014

No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN, Postmaster General,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

JOINT APPENDIX

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Certiorari Granted: April 27, 2015

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U.S. District Court District of Colorado (Denver)

CIVIL DOCKET FOR
CASE #: 1:10-CV-02201-LTB-KMT

Date Filed	#	Docket Text
09/08/2010	1	COMPLAINT-CIVIL RIGHTS (JURY TRIAL DEMAND) against John E. Potter (Filing fee $ 350, Receipt Number 031136) Summons Issued, filed by Marvin Green. (Attachments: # 1 Civil Cover Sheet, # 2 Receipt)(sah,) Modified on 9/9/2010 to correct the last name of the plaintiff (sah,). (Entered: 09/09/2010)
07/26/2011	20	AMENDED COMPLAINT against John E. Potter, filed by Marvin Green. (Mosby, John) (Entered: 07/26/2011)
11/14/2011	27	ANSWER to 20 Amended Complaint by Patrick R. Donahoe. (Cohen, Nathalie) (Entered: 11/14/2011)
11/12/2012	90	MOTION for Summary Judgment by Defendant Patrick R. Donahoe. (Attachments: # 1 Ex. A – Ehrenshaft Declaration, # 2 Ex. A, Att. 1 – Nov. 25, 2009, Letter, # 3 Ex. A, Att. 2 – April

21-July 2, 2009, Email Chain, # 4 Ex. A, Att. 3 – May 13, 2009, Step B Decision, # 5 Ex. A, Att. 4 – Aug. 17, 2009, Step B Decision, # 6 Ex. A, Att. 5 – Oct. 21, 2009, Step B Decision, # 7 Ex. A, Att. 6 – Oct. 21, 2009, Step B Decision, # 8 Ex. A, Att. 7 – Oct. 29, 2009, Step B Decision, # 9 Ex. A, Att. 8 – Nov. 10, 2009, Step B Decision, # 10 Ex. A, Att. 9 – Nov. 10, 2009, Step B Decision, # 11 Ex. A, Att. 10 – Nov. 10, 2009, Step B Decision, # 12 Ex. A, Att. 11 – Nov. 23, 2009, Step B Decision, # 13 Ex. A, Att. 12 – Nov. 19, 2009, Email, # 14 Ex. A, Att. 13 – Nov. 24, 2009, Emails, # 15 Ex. A, Att. 14 – Nov. 24, 2009, Step B Decision, # 16 Ex. A, Att. 15 – Nov. 24, 2009, Step B Decision, # 17 Ex. A, Att. 16 – Randleman Atatements, # 18 Ex. A, Att. 17 – Pay records, # 19 Ex. A, Att. 18 – Dec. 15. 25, 2009, Email, # 20 Ex. A, Att. 19 – EEO Complaint – 4E-800-0070-10, # 21 Ex. A, Att. 20 – EEO Complaint – 4E-800-0119-10, # 22 Ex. B – Ehrenshaft Depo. Excerpts, # 23 Ex. C – Knight Declaration, # 24 Ex. C, Att. 1 – Oct. 15, 2009, Email Attaching Congressional Inquiry, # 25 Ex. C, Att. 2 – Certified Mail Tracking Information, # 26 Ex.

C, Att. 3 – Certified Mail Tracking Information, # 27 Ex. C, Att. 4 – Emergency Placement letter, # 28 Ex. C, Att. 5 – Dec. 12, 2009, Emails, # 29 Ex. C, Att. 6 – Dec. 15, 2009, Email and Draft Settlement Agreement, # 30 Ex. C, Att. 7 – Dec. 15, 2009, Email, # 31 Ex. C, Att. 8 – Signed Settlement Agreement, # 32 Ex. D – Knight Depo. Excerpts, # 33 Ex. E – Smith Depo. Excerpts, # 34 Ex. F – Plaintiff's Interrogatory Response, # 35 Ex. G – Green Depo. Excerpts, # 36 Ex. H – Green Depo. Ex. 32 – August 14, 2008, EEO Complaint, # 37 Ex. I – Green Depo. Ex. 33 – May 14, 2009, EEO Informal Complaint, # 38 Ex. J – Green Depo. Ex. 34 – July 17, 2009, EEO Informal Complaint, # 39 Ex. K – Acknowledgment and Order, # 40 Ex. L – Notice of Right to File, # 41 Ex. M – Podio Depo. Excerpts, # 42 Ex. N – Mason Depo. Excerpts, # 43 Ex. O – Green Depo. Ex. 52 – Acknowledgement of Rights, # 44 Ex. P – Green Depo. Ex. 35 – March 22, 2010, EEO Infromal Complaint) (Cohen, Nathalie) (Entered: 11/12/2012)

12/19/2012	106	BRIEF in Opposition to 90 MOTION for Summary Judgment filed by Plaintiff Marvin Green. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit, # 16 Exhibit, # 17 Exhibit, # 18 Exhibit, # 19 Exhibit, # 20 Exhibit, # 21 Exhibit, # 22 Exhibit, # 23 Exhibit, # 24 Exhibit, # 25 Exhibit, # 26 Exhibit, # 27 Exhibit, # 28 Exhibit, # 29 Exhibit, # 30 Exhibit, # 31 Exhibit, # 32 Exhibit) (Mosby, John) (Entered: 12/19/2012)
01/11/2013	124	REPLY to Response to 90 MOTION for Summary Judgment filed by Defendant Patrick R. Donahoe. (Attachments: # 1 Ex. AA – Green Depo. Excerpts, # 2 Ex. BB – Green Depo. Ex 40 – Grievance Chart, # 3 Ex. CC – Ehrenshaft Depo. Excerpts, # 4 Ex. DD – Knight Depo. Excerpts, # 5 Ex. EE – Podio Depo. Excerpts) (Cohen, Nathalie) (Entered: 01/11/2013)

02/04/2013	129	ORDER granting 90 Defendant's Motion for Summary Judgment. This action is dismissed and Defendant is awarded costs, by Judge Lewis T. Babcock on 2/4/2013. (eseam) (Entered: 02/04/2013)
02/07/2013	133	FINAL JUDGMENT re: 129 Order on Motion for Summary Judgment, by Clerk on 2/7/13. (sgrim) (Entered: 02/07/2013)
03/08/2013	138	NOTICE OF APPEAL as to 133 Clerk's Judgment by Plaintiff Marvin Green (Filing fee $ 455, Receipt Number 1082-3260827) (Mosby, John) (Entered: 03/08/2013)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
DOCKET # 13-1096

Date Filed	Docket Text
03/11/2013	Civil case docketed. Preliminary record filed. DATE RECEIVED: 03/11/2013. Docketing statement due 03/25/2013 for Marvin Green. Transcript order form due 03/25/2013 for Marilyn Cain Gordon, Elisa Julie Moran and John Mosby. Notice of appearance due on 03/25/2013 for Patrick R. Donahoe and Marvin Green [13-1096]
05/16/2013	Appellant/Petitioner's brief filed by Marvin Green. 7 paper copies to be provided to the court. Served on 05/16/2013 by email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. -- [Edited 05/20/2013 by AD - brief cited deficient 5-20-13] [13-1096]- -[Edited 05/29/2013 by LG, brief deficiency corrected via errata on 5/29/2013] JM
07/29/2013	Appellee/Respondent's brief filed by Mr. Patrick R. Donahoe. 7 paper copies to be provided to the court. Served on: 07/29/2013.

	Manner of service: email. Oral argument requested? No. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1096] PF
08/15/2013	Appellant/Petitioner's reply brief filed by Marvin Green. 7 paper copies to be provided to the court. Served on 08/15/2013. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1096] JM
11/18/2013	Case argued by John Mosby for the Appellant, Paul Farley for the Appellee, and submitted to Judges Hartz, McKay and Matheson. [13-1096]
07/28/2014	Affirmed in Part, Reversed in Part and Remanded; Terminated on the merits after oral hearing; Written, signed, published; Judges Hartz (authoring), McKay and Matheson. Mandate to issue. [13-1096]
07/28/2014	Judgment for opinion filed. [13-1096]
09/19/2014	Mandate issued. [13-1096]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 10-cv-02201-LTB-KMT

MARVIN GREEN,

Plaintiff,

v.

PATRICK R. DONAHOE, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,

Defendants.

FIRST AMENDED COMPLAINT
(JURY TRIAL DEMAND)

Plaintiff, Marvin Green ("Green"), by and through his attorneys, John Mosby, Marilyn Cain Gordon and Elisa Moran, states and alleges the following as his claims for relief:

I. INTRODUCTION

1. This lawsuit seeks monetary damages, injunctive, and equitable relief, for Defendant's willful pattern of retaliatory conduct that was intentionally designed to force Marvin Green to retire from the United States Postal Service.

2. Green alleges that the agency retaliated against him because he opposed discrimination on August 14, 2008, May 12, 2009, and July 17, 2009; and because he participated in Title VII protected activity in 2008 and 2009; the last protected activity occurred on or about November 10, 2009.

3. Green's opposition to discrimination and his participation in EEO activity are protected under Section 704 of Title VII of the Civil Rights Act of 1964, as amended.

II. JURISDICTION

4. Green has met all statutory requirements and jurisdictional prerequisites for his Title VII civil rights claims.

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331 and §1343, this being an action brought under Title VII of the Civil Rights Act of 1964, as amended and the Civil Rights Act of 1991.

III. PARTIES

6. Marvin Green, a black American, is and was a resident of the state of Colorado at all times pertinent herein.

7. Patrick R. Donahoe is the Postmaster General of the United States Postal Service. The Postal Service is a federal governmental agency.

III. FACTUAL ALLEGATIONS

8. On August 4, 1973, Green began his employment with the USPS.

9. On February 9, 2010, Green signed his retirement papers, effective on March 31, 2010.

10. During Green's employment with the agency, he worked in management for 25 years, including 14 years as a postmaster,

11. During Green's employment with the agency, he had an unblemished employment record and was never disciplined.

12. Starting in 1973, Green's career blossomed. He advanced from a position of letter carrier to Postmaster.

13. Green's most recent promotion was in 2002, to an EAS-22 level Postmaster at the Englewood Colorado Post Office. The Englewood Post Office is in the Colorado/Wyoming district. Green supervised approximately 300 employees and 4 smaller post offices.

14. Since at least 1985, the agency has used its Officer-in-Charge program ("OIC"), as one of its mechanisms to prepare and advance employees, including postmasters, to the next higher level position.

15. The OIC program provides employees with opportunities to serve in assignments or details at the next higher level position. When an OIC assignment or detail ends, the employee, if qualified for the next higher level, is evaluated as "Ready."

16. Green joined the OIC program early in his career. On September 29, 1986, Green received his first OIC postmaster assignment, which lasted 7 months.

17. At the end of that first assignment, in 1987, Green received the following evaluation:

> "Mr. Green worked well with the employees and the community. He assisted his employees in upward mobility and maintained compliance with FLSA.

> The knowledge and job experience gained by Marvin during this detail have provided him a good background for promotional or additional detail opportunity. Mr. Green completed this assignment in an excellent manner."

18. Green's last OIC assignment occurred on September 30, 2006, as an EAS-24 postmaster at the Fort Collins, Colorado Post Office.

19. The Fort Collins' assignment ended on September 1, 2007. Green was rated as "Ready" for an EAS-24 postmaster position.

20. In early 2008, an EAS-24 postmaster position opened at the Boulder, Colorado Post Office.

21. Green had been a manager at the Boulder Post Office from 1989 to 1996. Green had also served in an OIC assignment as an EAS-24 postmaster at the Boulder Post Office.

22. In February 2008, Green submitted his OIC application officially requesting to be detailed to the open Boulder postmaster position.

23. Greg Christ, Green's immediate supervisor, was the decision-maker for the Boulder OIC detail. Christ was also ultimately responsible for selecting the permanent Boulder postmaster.

24. Christ, in contradiction to the OIC policies, never responded to Green's application for the Boulder OIC detail.

25. Instead, after Christ received Green's application, he contacted a non-black postmaster and informed that employee that he was being detailed into the Boulder postmaster position.

26. The individual Christ detailed had never joined the agency's OIC program, had never requested a detail to a higher level position, and had never competed for a postmaster position.

27. In July 2008, Christ selected this same individual to permanently fill the Boulder postmaster position.

28. On July 11, 2008, Green contacted an EEO counselor.

29. On August 14, 2008, Green filed a formal EEO complaint alleging denial of promotion based upon his race.

30. Shortly thereafter, Christ, who Green alleged discriminated against him, started retaliating by bullying and harassing Green.

31. On October 21, 2008, the agency completed investigating Green's EEO complaint.

32. On November 7, 2008, Green submitted his request to the agency for a hearing before the Equal Employment Opportunity Commission.

33. After Green requested an EEOC hearing, Christ's retaliatory conduct escalated and continued into 2009.

34. During this time, Green was a member of the National League of Postmasters.

35. Richard Sprague was the NLP's Colorado Branch President.

36. Around March 2009, Green sought Sprague's assistance to stop the agency's retaliatory harassment.

37. On March 10, 2009, Sprague and Green met with Christ to protest his retaliatory bullying, threatening, and harassing conduct toward Green.

38. After the March 10, 2009 meeting, Christ started harassing Green on a daily bases; he would give Green instructions, then go behind Greens' back and talk to Green's staff and give them different instructions.

39. In 2009, Charmaine Ehrenshaft was the Manager of Labor Relations for the agency's Colorado/Wyoming District.

40. Ehrenshaft, in the course of her duties, was aware of EEO activity and EEO complaints filed in the Colorado/Wyoming district.

41. Ehrenshaft normally communicated with postmasters through their supervisors regarding Labor Relations' matters; but in March or April 2009, she started directly contacting Green over grievance issues.

42. Around March or April 2009, Green started receiving harassing emails and correspondence from both Ehrenshaft and Christ.

43. On May 12, 2009, Green again contacted Sprague regarding the harassment. Sprague wrote the following to Christ:

> "I'm a little confused by all this micro managing of Englewood and your going behind the PM's back to talk to his staff. My confusion is why you would take one of our best performing offices (an office that at mid year is achieving most goals) and feel the need not to [sic] more supportive of this PM .

* * *

> If this is the way we treat one of the good offices then I'm to assume you are giving the non performing office [sic] three times the attention Marvin is getting. Last month you agreed to work on the communication between you and Marvin however I must be honest, to me all that happened is we got more micro managing. I ask you again to work with Marvin in away (sic) that is beneficial [sic] the Postal Service. We need PM's like Marvin more than ever."

44. On May 14, 2009, Green initiated EEO counseling and filed an informal EEO complaint alleging that the agency was retaliating against him.

45. Around this time, Green learned that Christ was retiring from the agency.

46. However, Ehrenshaft's contact with Green increased and her emails started including negative criticism of Green's day to day operation of the Englewood Post Office.

47. On July 2, 2009, Green emailed the following to Ehrenshaft, "Char, it is time for the harassing e-mails to stop...".

48. On or about July 17, 2009, Green engaged in EEO activity by contacting the agency's EEO office to file an informal EEO complaint alleging retaliation.

49. On August 12, 2009, the agency's EEO office informed Green that it had "concluded the processing of your claim of retaliation initiated on May 14, 2009" and informed him of his right to file a formal EEO complaint within 15 days.

50. In its August 12, 2009 letter, the agency's EEO office also stated:

> "For your information, the agency (USPS Law Department) was going to file a request to amend this current complaint into your prior EEO case #4E-800-0232-08 which is currently pending at the pre-hearing stage with the EEOC (Equal Employment Opportunity Commission (EEOC). The request for amendment has not been submitted as of this date."

51. On or about November 10, 2009, the EEOC gave the agency notice that the discovery process on Green's 2008 EEO complaint would begin and that the complaint would be set for hearing.

52. On November 25, 2009, while Green was at home on leave for the Thanksgiving holiday, Ehrenshaft had a certified letter delivered to Green's home that stated:

> "You are instructed to appear for an investigative interview *regarding allegations of non-compliance in the grievance procedure.* This interview will be held on Wednesday, December 2, 2009 at 1:00 pm in the Denver, Colorado Administration Building, Labor Relations Conference Room."

53. Green advised Ehrenshaft that Robert Podio, President of the Colorado Chapter of the National Association of Postmasters of the United States, would be representing him in this meeting.

54. On December 1, 2009, Podio, via email, informed Ehrenshaft that the meeting needed to be rescheduled. December 11, 2009, was agreed upon as the new date.

55. On December 9, 2009, Green held his monthly meeting with his then supervisor, Jarmin Smith. Green asked Smith, why was Ehrenshaft investigating him?

56. Smith stated he did not know. But he informed Green that Ehrenshaft had contacted him and requested he provide her with anything he had on Green.

57. Smith informed Ehrenshaft that he was not having any problems with Green, but told her he would forward to her a file that Greg Christ kept on Green, which Christ had emailed to him.

58. On December 11, 2009, the investigative interview occurred.

59. During the interview, Green was interrogated for, inter alia, intentionally delaying the mail.

60. Green had received no notice that "intentionally delaying the mail" was going to be a topic at the investigative interview.

61. Ehrenshaft and her boss, David Knight, interrogated Green for approximately two hours.

62. When the interview ended, Green was preparing to leave the room when two agents from the Office of Inspector General ("OIG") appeared.

63. The agents informed Green that they had been ordered to interrogate him for criminal conduct.

64. The agents informed Green that "intentionally delaying the mail was a felony offense," for which criminal charges could be filed.

65. Green informed the OIG agents that he had already been investigated for "intentional delaying the mail."

66. At the conclusion of the OIG interrogation, the agents informed Green that the intentional delaying the mail issue would be referred to the United States Attorney's Office, and that the U.S. Attorney's Office would decide whether criminal charges would be filed.

67. When the OIG interrogation ended, Ehrenshaft and Knight reappeared.

68. Green was ordered, without discussion or explanation, to sign an Emergency Placement memorandum.

69. Ehrenshaft and Knight ordered Green to immediately surrender his Agency identification and Agency cell phone.

70. Ehrenshaft and Knight ordered Green not to return to the Englewood Post Office.

71. The Emergency Placement memo informed Green of "Emergency Placement in Off-Duty Status" and further stated, "The reason(s) for this action is/are: Disruption of day-today postal operations." The memoranda also stated, "The employee is returned to duty status when the cause for **nonpay status** ceases." (Emphasis added).

72. On or about December 15, 2009, Podio contacted Green and informed Green that the agency had forwarded to him (Podio) a settlement document.

73. Podio informed Green that he had received the agency's settlement document, via email, from Ehrenshaft.

74. The terms of the agency's settlement document required Green, in order to be paid while on Emergency Leave, to take a downgrade to an EAS-13 postmaster position; and to either retire from the agency or transfer by March 31, 2010, to a position 400 miles from Denver, in the state of Wyoming.

75. The terms of the agency's settlement document required Green, if he transferred to the EAS-13 postmaster position, to take an approximately $38,784.00 reduction in salary.

76. The terms of the agency's settlement document required Green, in order to get his next paycheck, to use his annual leave from December 14, 2009 thru December 18, 2009.

77. The terms of the agency's settlement document required Green, in order to be paid after December 18, 2009, to use his sick leave from December 21, 2009 thru March 31, 2010.

78. The terms of the agency's settlement document allowed Green's annual and sick leave to be paid at his current EAS-22 salary until March 30, 2010.

79. After Podio informed Green of the agency's terms for Green to get paid, Green asked Podio why the agency was downgrading him to a EAS-13 and forcing him to transfer to another post office to get paid.

80. Podio told Green that this was the best deal he could get and that it could take up to a year before Green received a paycheck or got a hearing on the Emergency Leave/nonpay status issue.

81. Green stated to Podio "this ain't right." Podio then advised Green that the agency's settlement document did not require Green to waive his EEO rights to file a complaint on any of the agency's actions.

82. Green signed the agency's settlement document on December 16, 2009.

83. On February 9, 2010, Green signed his retirement papers, effective March 31, 2010.

84. On March 22, 2010, Green contacted the agency's EEO office to file an informal EEO complaint.

85. On April 26, 2010, Green filed a formal EEO complaint alleging that he was forced to retire (constructively discharged) based on retaliation.

* * *

FIFTH CLAIM FOR RELIEF
Civil Rights Violation of Title VII
(Constructive Discharge)

107. Green incorporates by reference paragraphs 1-85 above.

108. Title VII's anti-retaliation provision promotes the statute's primary objective of ensuring a workplace free from discrimination on the basis of race, ethnicity, religion or gender "[b]y preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of [Title VII's] basic guarantees."

109. Green has suffered an adverse action based upon retaliation. An "adverse action" is one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

110. Green asserts that after he engaged in activity protected under Title VII, the agency's retaliatory acts included, but were not limited to, a calculated pattern of harassment, bullying, insults, humiliation, and unjustified disciplinary actions. The agency sought to and did intentionally inflict severe emotional distress upon Green that has resulted in emotional injury for which he seeks damages.

111. Green asserts a causal connection between his protected activities and all subsequent adverse employment actions taken against him by the agency.

112. Green asserts that the agency forcing him to retire was based upon retaliatory motive, in violation of Title VII, and that the agency made his working conditions so intolerable that a reasonable person in his position would feel compelled to retire. Green asserts this as a separate actionable claim.

PRAYER FOR RELIEF

Plaintiff Green prays for the following relief:

A. As a direct and proximate result of the agency's actions, Green has been emotionally harmed and continues to suffer damages. Green prays for damages as may be proven at trial for this harm.

B. Reinstatement to his rightful place;

C. Award back pay and all benefits;

D. Alternatively, award appropriate Front Pay;

E. Award all actual and compensatory damages;

F Award attorney fees, costs, and expert witness costs and fees;

G. Award interest from the earliest possible date, continuing until all damages are collected;

H. Grant all other injunctive and appropriate relief at law and in equity as this Court deems just and proper.

PLAINTIFF DEMANDS A JURY OF SIX

Respectfully submitted

s/John Mosby
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UNITED STATES POSTAL SERVICE
EQUAL EMPLOYMENT OPPORTUNITY CASE
IN THE MATTER OF:

Marvin Green Complainant	Agency Case No. 4E-800-0119-10
v.	
John E. Potter, Postmaster General, c/o Western Area Operations Respondent.	Formal Filed: April 26, 2010

FINAL AGENCY DECISION –MIXED CASE

Introduction

Pursuant to Equal Employment Opportunity Commission (EEOC) regulations at 29 CFR § 1614.302(d) for mixed case complaints, this is the final agency decision of the U.S. Postal Service regarding the complaint of discrimination identified above.

Statement of Claim

The complainant alleged discrimination based on Retaliation (Prior EEO Activity) when he was forced to retire from his job as Postmaster, Englewood, Colorado on an unspecified date.[1]

[1] In his affidavit, the complainant clarified that he retired effective March 31, 2010.

Procedural Dismissal

The Commission describes an aggrieved employee as one who suffered a present harm or loss with respect to a term, condition or privilege of employment for which there is a remedy. See Diaz v. Department of the Air Force, EEOC Request No. 05931049 (April 22, 1994). To state a claim under Commission regulations, an employee must allege and show an injury in fact. Specifically, an employee must allege and show "direct, personal deprivation at the hands of the employer"; that is, a present and unresolved harm or loss affecting a term, condition or privilege of his or her employment. See Hobson v. Department of the Navy, EEOC Request No. 05891133 (March 2, 1990).

In the instant case, the complainant ratified the terms of the December 16, 2009 settlement agreement when he accepted the benefits. A fair reading of the agreement reveals that he was afforded significant benefits: given a saved salary; the Agency wouldn't pursue charges; allowed to use his leave; given the choice to retire or report to a new job; and was allowed to continue his career. Clearly, it is not a constructive discharge if one is given a choice. The complainant had the choice to retire, accept the new job, or not sign the agreement and defend himself against any potential charges. Further, there is no evidence in the record that he was coerced into signing the agreement. Dorrall v. Department of the Army, 201 F.3d 1375, at 1380 (Fed.Cir. 2002) "To establish involuntariness on the basis of coercion, an employee must show that the Agency effectively imposed the terms of the employee's resignation or retirement, that the employee had no realistic alternative but to resign or retire, and the employee's resignation or retirement was the result of

improper acts by the Agency." Wade v. Department of Agriculture, 60 MSPR 306, at 308-309 (1994) "Settlement presumed voluntary unless sufficient evidence of duress, coercion, or appellant misled." It is noteworthy that the complainant had the assistance of a representative at all times and both of them signed the settlement agreement.

Likewise, a Collateral Attack on Settlement Agreement also fails to state a claim. Mahoney v. Department of Labor, 56 MSPR 69, at 71-72 (1992); Sanders v. Department of Treasury, 83 MSPR 370, at 374 (2001) Appellant cannot prevail in an involuntary retirement appeal where the retirement results from a settlement without convincing the Board that the initial decision and settlement should be set aside.

Additionally, Equal Employment Opportunity Commission (EEOC) Regulations 29 C.F.R. 1614.107(a)(1) provide that the agency shall dismiss an entire complaint that states the same claim that is pending before or has been decided by the agency or Commission. The Commission has held that the same claim is one that sets forth identical matters. Terhune v. U.S. Postal Service, EEOC Request No. 05950907 (July 18, 1997). For purposes of determining whether a new complaint states the same claim, the Commission focuses on the action(s) or practice(s) of the agency about which the complainant complains. Meros v. Department of Commerce, EEOC Request No. 05950690 (January 10, 1997).

The Commission has long held that a complainant cannot raise an issue previously raised during EEO counseling. See Rebello v. U.S. Postal Service, EEOC Request No. 05980211 (June 24, 1999).

The record establishes that the complainant initiated counseling on an identical complaint on January 7, 2010 in Agency Case Number 4E-800-0070-10 wherein he alleged, "since I filed my informal EEO complaint in July, 2008, I have suffered continuous harassment . . . On December 11, 2009, after over a year of harassment, I was removed from my Postmaster position." The record establishes that the complaint was not resolved, he filed a formal complaint on February 17, 2010, and his complaint was procedurally dismissed on February 27, 2010. He subsequently filed an appeal with the EEOC Office of Federal Operations on or about March 23, 2010 and a decision is still pending.

In the instant complaint, the complainant is alleging a constructive discharge wherein he was forced to retire. However, the alleged intolerable incidents comprising the constructive discharge are the same incidents raised in Agency Case Number 4E-800-0070-10. He is in essence attempting to resurrect the same claim that was previously raised in Agency Case Number 4E-800-0070-10, which is currently pending a decision before the EEOC.

Accordingly, pursuant to 29 C.F.R. 1614.107 (a) (1), the complainant's claim is dismissed for failure to state a claim, for constituting a collateral attack on a settlement agreement, and for stating the same claim that is pending before or has been decided by the agency or Commission. Assuming, but only for the sake of argument, that the allegation is appropriate for adjudication on its merits, this decision will, in the alternative, address the merits of the claim.

Chronology

The complaint was processed in accordance with applicable Equal Employment Opportunity Commission (EEOC) Regulations, 29 C.F.R., §1614.103 *et. seq.* Following a Postal Service investigation, the complainant was provided a copy of the investigative file and notified of the forthcoming final agency decision on the merits. Thus, in accordance with EEOC Regulation 29 C.F.R. § 1614.302(d) *et seq.*, this decision is being issued on the merits of the complaint.

Applicable Law

Disparate Treatment

The United States Supreme Court established a burden-shifting framework for analyzing claims of discrimination in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), and subsequently refined that analysis in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The McDonnell Douglas and Burdine approach involves a three-step process when a complainant alleges intentional discrimination based on a disparate treatment theory. The Equal Employment Opportunity Commission has adopted this approach in its decision making. Downing v. U.S. Postal Service, EEOC Appeal No. 01822326 (September 19, 1983); Jennings v. U.S. Postal Service, EEOC Appeal No. 01932793 (April 13, 1994); and Saenz v. Department of the Navy, EEOC Request No. 05950927 (January 9, 1998). A complainant alleging discrimination must first demonstrate that there is some substance to his or her claim. To satisfy this burden, the complainant must establish a *prima facie* case of discrimination for each of the bases of discrimination alleged by a preponderance of the

evidence. Fumco Construction Company v. Waters, 438 U.S. 576 (1978).

Although a complainant may establish a *prima facie* case by presenting direct evidence of discrimination, the more frequent method of establishing a *prima facie* case is through circumstantial evidence by showing that he or she: (1) belongs to a protected class; (2) was subjected to an adverse employment action; and (3) was treated differently in this regard than similarly situated individuals who were not members of the protected group. Mayberry v. Vought Aircraft Company, 55 F.3d 1086, 1090 (5th Cir. 1995); Mitchell v. Toledo Hospital, 964 F.2d 577, 582-83 (6th Cir. 1992). The failure to establish a specific element of a *prima facie* case may be overcome by presenting evidence of agency actions from which an inference of discrimination could be drawn if they remained unexplained. Day v. U.S. Postal Service, EEOC Appeal No. 01996097 (September 18, 2000).

Once a *prima facie* case has been established, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its action. Fumco, 438 U.S. at 578. See also St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). The employer need not persuade the trier of fact that the proffered reason was its actual motivation but merely needs to raise a genuine issue of fact as to whether it discriminated against the complainant. Burdine, 450 U.S. at 254; Keval v. Commodity Futures Trading Commission, EEOC Appeal No. 01832127 (November 2, 1984); Hollis v. Department of Veterans' Affairs, EEOC Appeal No. 01934600 (May 3, 1994). If the agency offers no adequate explanation for the discrepancy in

treatment between the complainant and similarly situated employees, the agency does not carry its burden of production and the complainant prevails on the basis of the inference of discrimination created by the *prima facie* case. Frady v. U.S. Postal Service, EEOC Appeal No. 01A05317 (January 10, 2003); Houston v. Department of Veterans' Affairs, EEOC Appeal No. 01976054 (August 27, 1999); and Parker v. U.S. Postal Service, EEOC Request No. 05900110 (April 30, 1990).

If the employer meets this burden, any presumption of discrimination created by the *prima facie* case disappears; it simply "drops from the case." Hicks, 509 U.S. at 507; U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983). See also Hernandez v. Department of Transportation, EEOC Request No. 05900159 (June 28, 1990) and Peterson v. Department of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990). The complainant can then prevail only if he or she proves that the employer's reasons are not only pretext but are pretext for discrimination. Hicks, 509 U.S. at 507 and 516; Nichols v. Grocer, 138 F.3d 563, 566 (5th Cir. 1998); Swanson v. General Services Administration, 110 F.3d 1180, 1185 (5th Cir. 1997). See also Papas v. U.S. Postal Service, EEOC Appeal No. 01923753 (March 17, 1994) and Bradford v. Department of Defense, EEOC Appeal No. 01940712 (September 20, 1994). Thus, the complainant cannot create a factual issue of pretext based merely on personal speculation that there was discriminatory intent. Southard v. Texas Board of Criminal Justice, 114 F.3d 539, 555 (5th Cir. 1997); Lyles v. U.S. Postal Service, EEOC Appeal No.

01A11110 (May 22, 2002); and Nathan v. U.S. Postal Service, EEOC Appeal No. 01995788 (August 29, 2001).

Pretext involves more than a mistake. It means that the reason offered by management is factually baseless, is not the actual motivation for the action, or is insufficient to motivate the action. Tincher v. Wal-Mart Stores, Inc., 118 F.3d 1125, 1130 (7th Cir. 1997) and Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997). The complainant always carries the "ultimate burden of persuading the trier of fact that he has been the victim of intentional discrimination." Burdine, 450 U.S. at 254 and Hicks, 509 U.S. at 511.

At all times, the ultimate burden of persuasion remains with the complainant. Board of Trustees of Keene College v. Sweeney, 439 U.S. 24, 25 n.2 (1978). This burden was reaffirmed and clarified in St. Mary's Honor Center v. Hicks, *supra.,* where the Court held that in order to impose liability upon an employer for discriminatory employment practices, an ultimate finding of unlawful discrimination is required whether or not the employer's explanation for its action was believable. See also Brewer v. U.S. Postal Service, EEOC Appeal No. 01941786 (June 21, 1994) and Montoya v. Department of Housing and Urban Development, EEOC Appeal No. 01940999 (August 4, 1994).

Retaliation

To establish a *prima facie* case based on reprisal, a complainant must show that: (1) he or she engaged in prior protected activity; (2) the agency official was aware of the protected activity; (3) he or she was subsequently disadvantaged by an adverse employment action or adverse treatment; and (4) there is a causal

link between the protected activity and adverse action/treatment. Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass 1976), *aff'd* 545 F.2d 222 (1st Cir. 1976); Manoharan v. Columbia University College of Physicians and Surgeons, 842 F.2d 590, 593 (2nd Cir. 1988); Coffman v. Department of Veterans' Affairs, EEOC Request No. 05960437 (November 20, 1997); and Whitmire v. Department of the Air Force, EEOC Appeal No. 01A00340 (September 25, 2000). A complainant may establish prior EEO activity by participating at any stage of the EEO process or opposing unlawful discriminatory conduct. See, generally, Lewis v. Department of the Navy, EEOC Appeal No. 01810158 (May 22, 1981) (counseling stage); Ballard v. U.S. Postal Service, EEOC Appeal No. 01923276 (August 17, 1992) (witness); and Burrough v. U.S. Postal Service, EEOC Appeal No. 01842417 (June 24, 1986) (representative).

A complainant may also establish a *prima facie* case by presenting evidence which, if it was not explained, would reasonably give rise to an inference of reprisal. Shapiro v. Social Security Administration, EEOC Request No. 05960403 (December 6, 1996). Obviously, the complainant must offer evidence that the agency officials who took the action were aware of his or her prior participation or opposition activity (Demeier v. Department of the Air Force, EEOC Appeal No. 01A11166 (May 23, 2002)) but establishing that alone will not enable a complainant to establish the causal connection element of a *prima facie* case. Garcia-Gannon v. Department of the Air Force, EEOC Appeal No. 01821195 (June 30, 1983). Adverse actions need not be ultimate employment actions, just adverse

treatment based on a retaliatory motive, which could deter a reasonable person from engaging in protected activity. Burlington Northern Santa Fe Railway Company v. White, 548 U.S. 53 (2006); Lindsey v. U.S. Postal Service, EEOC Request No. 05980410 (November 4, 1999) and *EEOC Compliance Manual,* Section 8.0.3, Notice No. 915.003 (May 20, 1998).

The causal connection may be inferred by evidence that the protected conduct was closely followed by the adverse action. Clark County School District v. Breeden, 532 U.S. 286 (2001). The Court in Breeden noted that where a complainant is relying on temporal proximity to establish a causal connection between prior protected activity and a current adverse employment action, that proximity must be "very close" and cited with approval Circuit Court of Appeals decisions holding that time gaps of three to four months between an individual's prior EEO activity and the current adverse employment action were too attenuated to suggest an inference of retaliation. The Commission has followed suit and rendered decisions establishing much shorter time frames to establish the requisite temporal proximity. See, for example, Heads v. U.S. Postal Service, EEOC Appeal No. 01A51547 (June 2, 2005); Archibald v. Department of Housing and Urban Development, EEOC Appeal No. 01A54280 (September 22, 2005); and Lynch v. U.S. Postal Service, EEOC Appeal No. 01A24705 (August 14, 2003).

To support a finding of unlawful retaliation, there must be proof that the agency official(s) took the action at issue because of the complainant's prior protected activity and sought to deter the complainant or others. *EEOC Compliance Manual, Id.,* pp. 8-16.

Background

At all times relevant to the issue in this complaint, the complainant was employed as the Postmaster of Wamsutter, WY. (Investigative File [IF], Exhibit 1). The complainant has alleged that Manager, Labor Relations Charmaine Ehrenshaft, Manager, Post Office Operations Jarmin Smith, and former Manager, Post Office Operations Gregory Christ intentionally discriminated against the complainant by Retaliation (Prior EEO Activity) when he was forced to retire from his job as Postmaster, Englewood, Colorado, on March 31, 2010.

On December 11, 2009, the complainant was given an Investigative Interview by Mr. Knight regarding several issues in the Englewood, CO Post Office. He was also interviewed on that date by a Special Agent of the Office of the Inspector General (OIG), who was conducting an investigation as a result of a congressional inquiry they had received. The congressional inquiry was precipitated by a letter from the local branch president of the National Association of Letter Carriers (NALC) claiming, among other things, that the complainant had been delaying mail. On December 11, 2009, the complainant was given an Emergency Placement in a Non-Duty Status for disruption of day to day operations. On December 16, 2009, the complainant entered into an agreement with management, one stipulation of which was that he would retire on March 31,2010. (IF, Affidavit C, p. 7; Exhibits 3, 4).

The complainant contended that once he filed EEO Complaint No. 4E-800-0232-08 on August 14, 2008 against his former immediate supervisor Mr. Gregory

Christ, he was bullied, harassed, and insulted, resulting in a hostile work environment that continued until his allegedly forced retirement on March 31, 2010. (IF, Affidavit A, pp. 2, 3).

The complainant claimed that Mr. Christ and Mr. Jarmin Smith bullied, harassed, and threatened him about the day to day operations of his stations and about his performance. He contended that Ms. Ehrenshaft joined in the harassment in late 2008 or early 2009, going around his supervisor and giving him orders, criticizing his work and bombarding him with emails regarding the day to day operations of all post offices under his supervision. He continued that less than two (2) weeks after receiving an EEOC Acknowledgement and Order on his complaint, Ms. Ehrenshaft scheduled him for the Investigative Interview with her and Mr. Knight, which took place on December 11, 2009. The complainant alleged that they interrogated him for almost two (2) hours regarding delay of the mail, after which Special Agents from the OIG arrived. He explained that they advised him that they were investigating allegations of criminal conduct, and that he could be facing federal criminal charges of delaying the mail. He informed that he told the Agents that the charges had already been investigated and were "bogus", and they presented that the matter would be referred to the U. S. Attorney's Office, who would decide if charges would be filed. The complainant added that he was then placed on Emergency Placement in Off-Duty Status. (IF, Affidavit A, pp. 14-16; Exhibit 3).

The complainant claimed that on December 16, 2009, his representative contacted him and advised him that management had made a settlement offer, and

told him that if he did not accept it, it may be a year before he received a paycheck or a hearing on the matter. He maintained that the terms of the agreement were that the Postal Service would not pursue criminal charges against him, provided that he would take an immediate downgrade to EAS-13 Postmaster of Wamsutter, WY, without saved pay; that he did not have to report to Wamsutter until April 1, 2010; that if he did not report to Wamsutter on that date he would have to retire by March 31, 2010; and that he could take sick leave through March 31, 2010 so that he would have income. The complainant professed that he was forced to agree to the settlement offer because he could not afford to take the chance that criminal charges would be brought against him. He contended that he had no income, that he had no way to feed his family, that his home was in foreclosure, that his salary had been reduced approximately forty (40) thousand dollars a year, and that the Postal Service had created an environment so intolerable that he had to submit his retirement papers. (IF, Affidavit A, pp. 16, 17).

Prima Facie Analysis

Retaliation

As discussed previously, the complainant can make out a *prima facie* case of retaliation by showing that: (1) he engaged in prior protected activity; (2) the agency official was aware of the protected activity; (3) he was subsequently disadvantaged by an adverse employment action or adverse treatment; and (4) there is a causal link between the protected activity and adverse action/treatment. Hochstadt, *supra.*

The first element of the complainant's *prima facie* case has been met. The record shows that the

complainant engaged in prior EEO activity when he filed numerous EEO complaints, formal and informal. (IF, Exhibit 2).

The second element of the complainant's *prima facie* case has also been met. Both Ms. Ehrenshaft and Mr. Knight testified that they were aware of the complainant's prior EEO activity. (IF, Affidavit 8, p. 1; Affidavit C, p. 1).

However, the third element of the complainant's *prima facie* case has not been met. While the complainant claimed that he was forced to retire, and was thus subjected to an adverse employment action, he actually entered into a voluntary agreement which included the provision that he retire. His retirement was, therefore, his own choice and decision. (IF, Affidavit C, p. 7).

Turning to the fourth element of the complainant's *prima facie* case, it must be determined whether there is a causal link between the complainant's prior protected activity and the alleged adverse action/treatment. The Supreme Court has ruled that an inference of retaliation can be drawn from the temporal proximity between the protected activity and the adverse treatment, provided the temporal proximity is "very close." Breeden, *supra* (indicating that an inference of retaliation based on temporal proximity is not warranted if there is a three-month gap between the protected activity and the adverse treatment); see also Hendrix v. Department of the Navy, EEOC Appeal No. 01A10340 (August 8, 2001)(three month temporal relationship is insufficient to establish a causal connection).

The record shows that the complainant filed a formal EEO complaint in connection with Agency Case Number 4E-800-0232-08, the complaint he specified was the cause of the alleged retaliation, on August 14, 2008, and the last recorded activity related to that case occurred on November 13, 2008. The record also indicates that the complainant filed Agency Case Number 4E-800-0148-09 on May 14, 2009, which case was closed on August 12, 2009. The Settlement Agreement under which the complainant agreed to retire on March 31, 2010 was signed on December 16, 2009, more than thirteen (13) months after the EEO activity the complainant claimed was the reason for the alleged discrimination, and four (4) months after his most recent EEO complaint was closed. Subsequent EEO complaints post-dated the December 16, 2009 settlement agreement date. Given this history, the temporal proximity between the complainant's prior EEO activity and the adverse employment action was not sufficiently close to raise an inference of retaliation. See Dirmeier v. Department of the Air Force, EEOC Appeal No. 01A11166 (May 23, 2002). (IF, Affidavit C, p. 7; Exhibit 2, p. 4).

Although a complainant can make a *prima facie* case of retaliation based on evidence of disparate treatment (i.e., that he was treated less favorably than a similarly situated individual who refrained from engaging in EEO activity), the complainant attempted no such showing in the instant case. While the complainant is not limited to presenting comparative evidence to establish a *prima facie* case of disparate treatment discrimination, see Lipcsey v. U.S. Postal Service, EEOC Appeal No. 01981884 (January 6, 2000), he has not presented any other evidence that affords a

sufficient basis from which to draw an inference of discrimination.

Based on the analysis above, the complainant failed to establish a *prima facie* case of retaliation.

Harassment/Hostile Work Environment

In cases involving harassment, court and EEOC decisions have modified somewhat the McDonnell Douglas analytical approach in order to achieve "a sensible, orderly way to evaluate the evidence." To establish a *prima facie* case of harassment, the complainant must show: (1) membership in a protected class, (2) unwelcome personal slurs or other denigrating or insulting verbal or physical conduct, (3) that the harassment complained of was based on his membership in the protected class, and (4) that the harassment was sufficiently severe or pervasive to affect a term or condition of employment, and/or that the harassment had the purpose or effect of unreasonably interfering with his work performance and/or that the harassment had the purpose or effect of creating an intimidating, hostile, or offensive work environment. McGinnis v. Secretary of Defense, EEOC Appeal No. 01902760 (November 15, 1990); Sexton v. U. S. Marine Corps, EEOC Appeal No. 01821475 (August 30, 1983).

Record evidence and testimony disclosed that the complainant has established prong (1) of a *prima facie* case for his claims as analyzed under McDonnell Douglas, as the complainant belong to the following protected class: retaliation (prior EEO activity).

However, with regard to prong (2) there is no indication that the complainant was subjected to unwelcome personal slurs or other denigrating or

insulting verbal or physical conduct. The complainant testified that he was bullied, harassed, and insulted by Mr. Christ, Mr. Smith, and Ms. Ehrenshaft, and also "bombarded" with emails by Ms. Ehrenshaft. (IF, Affidavit A, pp. 3, 14, 15).

While the complainant made the above claims, he provided no evidence or testimony to support his allegations, no witnesses, and no copies of the emails with which he was allegedly "bombarded".

Based on the above, the complainant has not established prongs (2) or (3).

For the reasons stated below, the complainant also has not met prong (4) in that the complainant has not shown that the occurrences complained of rose to the level of discriminatory harassment.

For harassment to be considered discriminatory, it must be severe or pervasive. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). Actual psychological or emotional injury is not required. However, unless the conduct is very severe or persistent, a single incident or group of isolated incidents will not be regarded as discriminatory harassment. Scott v. Sears Roebuck and Co., 798 F.2d 210 (7th Cir. 1986); Hansen v. Rice, EEOC Appeal No. 01920621 (September 10, 1992). "Harassment, as the term is used in Title VII cases, refers to more than being subjected to stress." Lin v. U.S. Postal Service, EEOC Appeal No. 01932880 (December 23, 1993).

The following factors are pertinent to determining whether a work environment is hostile, intimidating, or abusive: (1) whether the conduct in question is verbal or physical, or both; (2) whether the conduct was repeated, and, if so, how frequently; (3) whether the

conduct was hostile or patently offensive, (4) whether the alleged harasser was a supervisor or a coworker, (5) whether more than one person joined in the harassment, and (6) whether the harassment was directed at more than one individual. King v. Hillen, 21 F.3d 1572 (Fed. Cir. 1994); Crane v. U.S. Postal Service, EEOC Appeal No. 01924585 (April 22, 1993). Evidence of the general working atmosphere involving employees other than the complainant is also relevant to the issue of whether a hostile . . . work environment exists. Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), *aff'd in relevant part and rev'd in part, sub nom* Meritor Federal Savings Bank v. Vinson, 477 U.S. 57 (1986); Delgado v. Lehman, 665 F. Supp. 460 (E.D. Va. 1987).

The conduct in question should be evaluated from the standpoint of a reasonable person, taking into account the particular context in which it occurred. Highlander v. K.F.C. National Management Co., 805 F.2d 804 (6th Cir. 1986). Conduct that is not severe or pervasive enough to create an objectively hostile or abusive environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview. Harris, 510 U.S. at 22-22. Furthermore, if the complainant does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of employment, and there is no Title VII violation. Harris, 510 U.S. 21-22. A showing of discriminatory harassment "must include discrete comments directed against the complainant or disparate treatment which supports an inference of discriminatory harassment." Lin v. U.S. Postal Service, EEOC Appeal No. 01932880 (December 23, 1993). Accordingly, it is appropriate to review a complainant's allegations under a disparate treatment

analysis where there is no direct evidence of discriminatory harassment, that is, where there is no evidence of personal slurs or other denigrating or insulting verbal or physical conduct relating to her membership in a protected class.

In the instant case, there was no showing that the events claimed by the complainant even took place. The complainant was given an Investigative Interview relative to claims that had been made against him, he was placed in a paid, non-duty status, and several days later his representative contacted management with settlement offer.

The complainant has not shown that any of the actions complained of, either individually or collectively, even occurred, much less rose to the level of discriminatory harassment.

Accordingly, the complainant has failed to establish a *prima facie* case of harassment based upon retaliation.

Management's Response

Assuming, for the sake of argument, that the complainant has established a *prima facie* case of discrimination based on reprisal, management has articulated a legitimate, nondiscriminatory explanation for their actions.

Ms. Ehrenshaft related that the complainant was given an Investigative Interview regarding several matters at the Englewood, CO Post Office, after which he was given an Emergency Placement in Non-Duty Status for disruption of day to day postal operations, consistent with *Employee and Labor Relations Manual* (ELM) Section 651.3. She advised that it was her

understanding that subsequent to that placement, his representative contacted Mr. Knight regarding a settlement agreement. She contended that the complainant was not forced to retire, but that he voluntarily signed a settlement agreement that included his retirement as one of its terms, and that he retired March 31, 2010. She continued that other than the Emergency Placement, no decisions had been made relative to the complainant before his representative contacted Mr. Knight. She averred that she made no decisions regarding the accepted issue in the instant complainant. She noted that the complainant was reassigned to the Wamsutter, WY Post Office on December 19, 2009, and was given saved pay, that is, that he maintained the same pay he had as Postmaster of Englewood, CO. (IF, Affidavit B, pp. 2, 3; Affidavit C, p. 7; Exhibit 1; Exhibit 3).

Mr. Knight testified that he gave the complainant an Investigative Interview on December 11, 2009 regarding four (4) issues: 1) that he was sexually harassing one of his managers; 2) that he was having that same manager complete his homework assignments for college courses that the Postal Service was paying for and were part of his Postal leadership Program; 3) that he failed to properly complete union grievances resulting in liability for the Postal Service; and 4) that he intentionally delayed mail receipts paid for by the NALC to alter his timeliness for answering grievances. He added that the union had requested a congressional investigation into the complainant's conduct. Mr. Knight continued that after the interview he placed the complainant on paid leave pending a formal fact finding on the charges of sexual harassment. He advised that the following day, he was

contacted by the complainant's representative who asked if the Postal Service would allow the complainant to take leave and then retire if they agreed not to take any action or charge the complainant based upon the Investigative Interview. Mr. Knight informed that an agreement was drafted and sent to the complainant's representative, who presented it to the complainant who then signed it, and the agreement was faxed back to Mr. Knight's office. He maintained that the complainant's offer of retirement in lieu of charges was accepted and incorporated into the agreement. (IF, Affidavit C, pp. 2, 7; Exhibit 4).

Mr. Knight explained that the complainant's offer to retire was accepted with the stipulation that he relinquish his then-current position as Postmaster of Englewood, CO so that the position could be filled and not be vacant for several months pending the complainant's retirement, and if he did not retire per the agreement, then he would assume another postmaster position at a lower level. He added that the complainant continued to be paid at the same level as at Englewood. (IF, Affidavit C, pp. 2, 3).

Time and Attendance Control System (TACS) records in the file established that the complainant was in a pay status continuously from December 11, 2009 through March 31, 2010, the date of his retirement even though ELM Section 519.24 provides that he could have been placed in a non-pay status pending the outcome of the investigation. Further, ELM Section 651.4 provides that employees may be immediately placed in a non-pay, non-duty status when they disrupt postal operations in any way. Also, his PS Forms 50 confirmed that he was provided with Saved Rate status when he was reassigned as Postmaster, Wamsutter,

WY, and so he continued to be paid at the same rate as when he was Postmaster of Englewood, CO. (IF, Exhibits 1, 5, 6).

Based on the evidence and testimony in the record, management responded appropriately in removing the complainant from a duty status, in investigating the charges against the complainant, and in accepting his voluntary downgrade and retirement in lieu of continuing the investigation and perhaps ultimately charging the complainant based on the outcome of the investigation.

Pretext

At this point, the complainant has the burden of proving that management's stated reason is not only pretext, but is pretext for discrimination. Tincher v. Wal-Mart Stores, Inc., 118 F.3d 1125, 1129 (7th Cir. 1997).

The complainant claimed that he was harassed, bullied, insulted, "bombarded" with emails, and forced to retire, after filing EEO Complaint No. 4E-800-0232-08 on August 14, 2008. (IF, Affidavit A, pp. 3, 14, 15).

He offered no evidence or testimony to support his allegations, while management produced a settlement agreement which the complainant signed. Although the complainant claims that he was forced to retire, he signed an agreement that included the acknowledgement that it was in the mutual interest of both parties to do so. The document speaks for itself.

The complainant's allegations are unsupported by the totality of the record. In other words, there is nothing that shows by a preponderance of the evidence that the legitimate explanations given by the Postal

Service were a pretext for discrimination. Hammons v. HUD, Request No. 05971093, EEOC Appeal No. 01955704 (August 10, 1997). Hence, management's nondiscriminatory reasons have not been proven to be a pretext for illegal discrimination.

Conclusion

After carefully considering the entire record, and applying the legal standards outlined in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973); Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F.Supp. 318 (D. Mass 1976), *aff'd* 545 F.2d 222 (1st Cir. 1976) (applying to reprisal cases); and Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), citing Meritor Savings Bank F.S.B. v. Vinson, 477 U.S. 57 (1986) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) (applying to harassment cases); the evidence does not support a finding that the complainant was subjected to discrimination as alleged. Consequently, this complaint is now closed with a finding of no discrimination.

Statement of Relief

Because the Complainant did not prevail on his claim of discrimination, no relief is awarded.

MIXED CASE APPEAL RIGHTS

If the complainant is dissatisfied with this final agency decision, as an individual arguably entitled to appeal the issue raised in this complaint to the Merit Systems Protection Board, the complainant may appeal this decision to the Merit Systems Protection Board, **not the Equal Employment Opportunity Commission**, no later than thirty (30) days of the date of receipt of this decision. The appeal should indicate

whether the complainant desires a hearing and should be addressed to:

Merit Systems Protection Board
Denver Field Office
165 South Union Boulevard, Suite 318
Lakewood, CO 80228-2211

In lieu of an appeal to the Merit Systems Protection Board, the complainant may file a civil action in an appropriate United States District Court within thirty (30) calendar days of the date of receipt of this decision. If the complainant chooses to file a civil action, that action should be styled **Marvin C. Green v. John E. Potter, Postmaster General**. The complainant may also request the court to appoint an attorney for the complainant or to authorize the commencement of that action without the payment of fees, costs, or other security in such circumstances as the court deems just. The application must be filed within the same thirty-day time period for filing the civil action.

s/Joceline A. Height
Joceline A. Height
EEOC Services Analyst Date: August 5, 2010
NEEOISO
P.O. Box 21979
Tampa, FL 33622-1979

Enclosure: MSPB Appeal Form 185
cc:
Complainant
[redacted]
Delivery Confirmation No. 0310 1230 0000 8726 3404

Representative
John Mosby, Esq.
621 17th St., Suite 1035

Denver, CO 80293-1000
Delivery Confirmation No. 0310 1230 0000 8126 3398

District Manager, Human Resources
Colorado/Wyoming District
7500 East 53rd Pl. Room 2246
Denver, CO 80266-9994

Regional Manager, EEO Compliance and Appeals
Western Area Office
PO Box 300
Denver, CO 80201-0300

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 10-cv-02201-LTB-KMT

MARVIN GREEN,

Plaintiff,

v.

PATRICK R. DONAHOE,
POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Defendants.

ANSWER TO AMENDED COMPLAINT

Defendant, by and through undersigned counsel, hereby answers Plaintiff's Amended Complaint (Docket No. 20) as follows:

* * *

III. FACTUAL ALLEGATIONS

* * *

72. Defendant has insufficient knowledge to admit or deny the allegations contained in paragraph 72 of the Amended Complaint.

73. Defendant has insufficient knowledge to admit or deny the allegations contained in paragraph 73 of the Amended Complaint.

74. Denied.

75. Admitted that if Plaintiff did not retire and assumed work in the EAS-13 postmaster position, his

salary would be reduced. The remaining allegations in the paragraph are denied.

76. Denied.

77. Denied.

78. Admitted.

79. Defendant has insufficient knowledge to admit or deny the allegations contained in paragraph 79 of the Amended Complaint.

80. Defendant has insufficient knowledge to admit or deny the allegations contained in paragraph 80 of the Amended Complaint.

81. Defendant has insufficient knowledge to admit or deny the allegations contained in paragraph 81 of the Amended Complaint.

82. Admitted.

83. Admitted.

84. Admitted.

85. Admitted.

* * *

AFFIRMATIVE DEFENSES

1. Plaintiff fails to state a claim for which relief can be granted.

2. Defendant's actions were based on legitimate, non-discriminatory business reasons.

3. Plaintiff's claims for damages are barred in whole, or in part, because he failed to mitigate damages.

6. Plaintiff did not timely and adequately exhaust his administrative claim.

7. Plaintiff's allegedly protected activity was not the but-for cause of any actions.

8. Plaintiff's [sic] did not suffer any adverse employment action.

9. Plaintiff's compensatory damages are capped at $300,000. 42 U.S.C. § 1981a(b)(3)(D).

Dated this 14th day of November, 2011.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-02201-LTB-KMT

MARVIN GREEN,

Plaintiff,

v.

PATRICK R. DONAHOE, Postmaster General, United States Postal Service,

Defendant.

DECLARATION OF DAVID KNIGHT

I, David Knight, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge, hereby make the following declaration relating to the above-entitled matter.

* * *

42. On the day after Mr. Green's investigative interview, December 12, 2009, I received an email from Mr. Podio. In that email, Mr. Podio asked whether I would stop "any process" if he "can get marvin [Mr. Green] to retire." Attachment 5 is a true and correct copy of an email chain between me and Mr. Podio, from December 12, 2009.

43. Through emails and phone calls, Mr. Podio, on behalf of Mr. Green, and I negotiated to reach a settlement in which the Postal Service would agree not to pursue any of the issues discussed at the investigative interview and Mr. Green would agree to retire.

44. I did not negotiate the settlement agreement in retaliation for Mr. Green's prior EEO activity.

45. On December 15, 2009, I sent Mr. Podio a draft settlement agreement. Attachment 6 is a true and correct copy of the email I sent to Mr. Podio and the attached draft settlement agreement.

46. Mr. Podio requested that certain changes be made to that draft. Attachment 7 is a true and correct copy of the email I received from Mr. Podio regarding making changes to the draft settlement agreement.

47. Mr. Green, Mr. Podio and I signed the finalized settlement agreement on December 16, 2009. Attachment 8 is a true and correction copy of the signed settlement agreement.

48. The provision of the settlement agreement placing Mr. Green in the Wamsutter position pending his retirement was included so that someone could immediately step into the Englewood Postmaster position. Englewood is a large post office, and Mr. Green would be using leave and would not be retiring until March 31, 2010. I needed to place someone in the Englewood position as soon as possible to take over the responsibilities of the Postmaster job, which I could not do if Mr. Green remained in the Englewood position until March 31, 2010.

49. Mr. Green's placement in the Wamsutter position was on paper only.

50. Moreover, Mr. Green had agreed to retire effective March 31, 2010, and it was my understanding that Mr. Green would follow through on that agreement and therefore would not be reporting to the Wamsutter office on April 1, 2010. *Id.*

51. Mr. Green was not required to sign the settlement agreement, and I never told him he was required to sign it. Mr. Green could have chosen to appeal his emergency placement. He could also have chosen to wait and see what discipline, if any, resulted from any investigation into the issues discussed during his investigative interview.

52. None of the actions I took with respect to Mr. Green were in retaliation for his prior EEO activity.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 9th day of November, 2012.

s/David Knight
David Knight

From: Knight, David W - Denver, CO
To: Ehrenshaft, Charmaine A - Denver, CO
Sent: 12/12/2009 8:15:25 PM
Subject: Fw: Marvin

I am going to hell

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Sent: Sat Dec 12 19:13:24 2009
Subject: Re: Marvin

Thanks Bob. I am dead tired from working on PES for the last 24 hours. He should be extremely concerned about the delay of mail with the return receipts the DIG is all over this and the criminal issue could be a life changer. Let me know if I can help.

----- Original Message -----
From: Podio, Robert L - Pueblo, CO
To: Knight, David W - Denver, CO
Sent: Sat Dec 12 19:05:33 2009
Subject: Re: Marvin

I need to process his emergency placement you on Monday but I will continue to work on him I have a couple of discussions him today so have a little patience and I think I can make it happen
Thanks
Bob Podio Postmaster

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Cc: Ehrenshaft, Charmaine A - Denver, CO
Sent: Sat Dec 12 19:00:07 2009
Subject: Re: Marvin

This should read " if he retires immediately"

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Cc: Ehrenshaft, Charmaine A - Denver, CO
Sent: Sat Dec 12 18:37:09 2009
Subject: Re: Marvin

He will not be on admin until his vet pref starts. I will also stop any criminal charges involving the obstruction or delay of mails that may come from his interview with the DIG on 12/11/09.

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Cc: Ehrenshaft, Charmaine A - Denver, CO
Sent: Sat Dec 12 18:30:08 2009
Subject: Re: Marvin

If he retires I will not charge him.

----- Original Message -----
From: Podio, Robert L - Pueblo, CO
To: Knight, David W - Denver, CO
Sent: Sat Dec 12 12:43:33 2009
Subject: Marvin

If I can get marvin to retire will you any process you started?

54

From: Podio, Robert L - Pueblo, CO [robert.l.podio@usps.gov]
Sent: Saturday, December 12, 2009 8:24 PM
To: Knight, David W - Denver, CO
Subject: Re: Marvin

Thanks I will start to work toward that type of process Bob Podio Postmaster

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Sent: Sat Dec 12 19:22:16 2009
Subject: Re: Marvin

Yes I would do that

----- Original Message -----
From: Podio, Robert L - Pueblo, CO
To: Knight, David W - Denver, CO
Sent: Sat Dec 12 19:15:59 2009
Subject: Re: Marvin

So if I get to sign retirement paperwork say effective Feb 1 can he take sick leave until then and he can not revoke that date to retire Bob Podio Postmaster

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Cc: Ehrenshaft, Charmaine A - Denver, CO
Sent: Sat Dec 12 19:00:07 2009
Subject: Re: Marvin

This should read " if he retires immediately"

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Cc: Ehrenshaft, Charmaine A - Denver, CO
Sent: Sat Dec 12 18:37:09 2009
Subject: Re: Marvin

He will not be on admin until his vet pref starts. I will also stop any criminal charges involving the obstruction or delay of mails that may come from his interview with the OIG on 12/11/09

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Cc: Ehrenshaft, Charmaine A - Denver, CO
Sent: Sat Dec 12 18:30:08 2009
Subject: Re: Marvin

If he retires I will not charge him.

----- Original Message -----
From: Podio, Robert L - Pueblo, CO
To: Knight, David W - Denver, CO
Sent: Sat Dec 12 12:43:33 2009
Subject: Marvin

If I can get marvin to retire will you any process you started?
And are you putting on admin?
Bob Podio Postmaster

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-02201-LTB-KMT

DEPOSITION OF: AGENT WILLIAM
PATRICK MASON
April 17, 2012

MARVIN GREEN,

Plaintiff,

v.

PATRICK R. DONAHOE,
POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Defendant.

PURSUANT TO NOTICE, the deposition of AGENT WILLIAM PATRICK MASON was taken on behalf of the Plaintiff at 633 17th Street, Suite 1990, Denver, Colorado 80293, on April 17, 2012, at 12:57 p.m., before Darcy Curtis, Registered Professional Reporter and Notary Public within Colorado.

* * *

[4:1]

WHEREUPON, the following proceedings were taken pursuant to the Federal Rules of Civil Procedure.

* * * * *

AGENT WILLIAM PATRICK MASON,
having been first duly sworn to state the whole truth, testified as follows:

EXAMINATION

BY MR. MOSBY:

* * *

[19:1]

Q. Okay. And did you notice any notes in the case file?

A. No handwritten notes. We have a chron log in the case file.

Q. And were notes uploaded in this case?

A. No.

Q. How do you know that?

A. Because I reviewed the hard copy notes.

Q. Okay. If there was a dispute between what you said to Mr. Knight and say he disagreed, how would you resolve it?

MS. COHEN: Objection. Misstates prior testimony.

A. I'm not sure I understand the question.

Q. (BY MR. MOSBY) Okay. So could you look in your file to see if there's any notes from Mr. Knight?

A. Certainly I could, yes.

Q. Do you know what date you talked to Mr. Knight?

A. I believe if I did speak with – I believe I spoke with Mr. Knight the same day that I spoke with Marvin.

[20]

Q. (BY MR. MOSBY) What makes you believe that?

A. I have an entry in my chron log indicating as such.

Q. Okay. And did Mr. Knight fill you in on any details of the case?

MS. COHEN: Objection. Vague.

A. I recall, based on my notes, discussing that Mr. Green had been interviewed regarding other circumstances. I don't recall what those other circumstances were.

Q. (BY MR. MOSBY) Okay.

A. Other problems within the Postal Service.

Q. Were you aware that Mr. Knight had interviewed Mr. Green?

A. Yes.

Q. And how soon after Mr. Knight's interview ended did your start?

A. You know, I really don't recall.

Q. Did Mr. Knight tell you that he had interviewed Mr. Green?

A. I believe that, yes, he did.

Q. Okay. Did Mr. Knight tell you if there was anyone present representing Mr. Green?

A. I don't recall.

* * *

[37:1]

Q. (BY MR. MOSBY) How many times have you read Mr. Green his rights?

A. Just the one time –

Q. Oh, okay.

A. – in December of 2009.

Q. Was that on December 11?

A. I believe so.

Q. Was that at 12:39 p.m.?

A. I'm not sure.

Q. Well, isn't that the time you wrote in your notes?

A. I would have to see that.

Q. Okay. But did you, on December 11 when you interviewed Mr. Green, provide him with his rights?

A. Yes.

Q. Were they Garrity rights, or were they Miranda rights?

A. Garrity rights.

Q. Okay. Why did you provide him with Garrity rights?

A. Because he wasn't under arrest.

Q. Okay.

A. And it was part of a criminal investigation.

[38]

Q. Okay. Why was it a criminal investigation? What made it criminal?

A. Well, it was potentially – there were accusations that he was willfully delaying the mail, mistreating the mail.

* * *

[65:2]

Q. Assuming that you spoke to him afterwards, would you have indicated to him what your findings were going to be?

A. In general, with regard to cases that I work, investigative cases, it would make sense that I would pass on information to human resources or labor relations, what the findings of my case were.

Q. Did you ever pass on information to Mr. Knight or to management that you thought there was no criminal conduct in this case?

A. Again, I don't recall.

* * *

[LOGO]: United States Postal Service

AGREEMENT
BETWEEN
MARVIN GREEN & THE U.S. POSTAL SERVICE

The undersigned parties agree that it is in the mutual interest of both the Postal Service and employee, Marvin Green, to consent and adhere to the following terms and conditions:

1. Marvin Green will immediately relinquish the level 22 Postmaster job in Englewood, Colorado which he currently occupies.
2. Marvin Green will be assigned and accept placement to Wamsutter, Wyoming, EAS-13. This position shall be recorded as Mr. Green's permanent position for PS Form 50 requirements.
3. Mr. Green will receive saved salary as described in the Employee and Labor Relations Manual until March 30, 2010.
4. The agency agrees that no charges will be pursued based on the items reviewed during interviews conducted on December 11, 2009.
5. Mr. Green will be allowed to utilize forty (40) hours of annual leave, from December 14, 2009 through December 18, 2009 provided a leave slip is submitted to Post Office Operations Manager, Jarmin Smith no later than Thursday, December 17, 2009, close of business.
6. Mr. Green will be allowed to utilize sick leave, as requested, starting December 21, 2009 and running thru March 31, 2010.
7. Mr. Green agrees to retire from the Postal Service no later than March 31, 2010. Mr. Green

agrees to take all necessary steps to effect his retirement on or before March 31, 2010. If retirement from the Postal Service does not occur Mr. Green will report for duty in Wamsutter, Wyoming on April 1, 2010 and the saved salary shall immediately cease.

The undersigned parties to this agreement hereby agree to hold the terms and conditions of this agreement in strict confidence. No party shall release this agreement unless it becomes necessary to enforce this agreement. All parties agree that they have read and fully understand the agreement.

Marvin Green 12/16/09
Marvin Green Date

David Knight 12/16/2009
David Knight, Mgr.,
Human Resources/Date

Robert Podio 12/16/2009
Robert Podio, Representative/Date

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS

MARVIN GREEN, Complainant, v. JOHN E. POTTER, Postmaster General, United States Postal Service, Agency.	)	Agency Case No. 4-E-800-0700-10

DECLARATION OF ROBERT PODIO

I, Robert Podio, in accordance with the requirements of Title 28 – United States Code – Section 1746 declare, under penalty of perjury that if called to testify in this matter would state that:

1. I am the President of the Colorado Chapter of NAPUS (National Association of Postmaster of the United States). My office is located in Pueblo, Colorado.

2. In my capacity as President of NAPUS, I represent postmasters in their disputes with the Postal Service, including investigative interviews.

3. Marvin Green is a member of NAPUS.

4. In December 2009, Marvin Green contacted me and requested that I represent him at an investigative interview scheduled for December 11, 2009.

initials

5. I represented Marvin Green at the December 11, 2009 meeting, which lasted for approximately one hour. I was Mr. Green's only representative at the meeting.

6. At the conclusion of the meeting, Mr. Green was placed on emergency leave.

7. The negotiations occurred between myself and USPS over the telephone. Mr. Green was not present during any negotiations.

8. The Agreement I negotiated required Marvin Green to either retire from USPS after 36 years or alternatively, if he decided not to retire, he would be required to transfer to a lower position in Wamsutter, Wyoming and be demoted from a level 22 Postmaster to an EAS level 13.

9. USPS never required, as part of the settlement agreement, that Marvin Green or his representative waive or agree not to pursue any rights or remedies, including his right to file an EEO complaint.

Robert Podio
Robert Podio
President, Colorado
Chapter of NAPUS

3-30-10
Date

WESTERN

Reference: PRE-017721-2010

Information for Pre-Complaint Counseling

Certified Mail No.	Date Mailed or Hand Delivered on
By (Initials)	Case No. 4E-800-0119-10

On 3/22/2010 (Month, Day, Year), you requested an appointment with a Dispute Resolution Specialist.

Important: Please read. You should complete this form and return it to the EEO office within 10 calendar days of receipt. This is the only notification that you will receive regarding the necessity for you to complete this form.

Name (Last, First, MI)	Social Security	Home Telephone No.
GREEN, MARVIN C	9696	303-941-5782
Your Mailing Address: 19432 E. MILAN CIR AURORA, CO 80013-3914		Finance Number: 072880
Name of Postal Facility Where You Work: ENGLEWOOD POST OFFICE		Office Telephone No.: N/A
Address of Postal Facility: 3330 S. BROADWAY ENGLEWOOD, CO 80113-9998		Email Address: N/A

Employment Status (Check One)	Position Title	Grade Level
☐ Applicant ☐ Casual ☐ TE ☒ Career	POST MASTER	EAS-22

Pay Location	Tour	Duty Hours	Off Days (If Your Tour Shows Nights Off)	Time in Current Position
400	II	N/A	N/A	2 Years 5 Months

Your Supervisor's Name	Supervisor's Title (OM 100)	Supervisor's Telephone No.
JARMAN SMITH	MANAGER POST OFFICE OPERATIONS	(303-853-6417

Providing this information will authorize the U.S. Postal Service to send you important documents electronically.

Prohibited discrimination includes actions taken based on your Race, Color, Religion, Sex, Age (40+), National Origin, Physical and/or Mental Disability, or in Retaliation (acting based on your participation in prior EEO activity). These categories are referred to on this form as factors.

What factor(s) of Discrimination are you alleging? (Please be specific, i.e., Race-African American, Sex-Female).

RETALIATION – HARASSMENT, BULLYING, FORCED RETIREMENT FOR ENGAGING IN TITLE VII PROTECTED ACTIVITY.

For Retaliation Allegations Only. If you are alleging retaliation discrimination, provide the date(s) and specifics of the EEO activity that you feel caused you to be retaliated against.

1. On 08/14/2008 (Month, Day, Year), I engaged in EEO activity. Case No. #4E-800-0232-08
2. On 02/17/2010 (Month, Day, Year), I engaged in EEO activity. Case No. #4E-800-0070-09 OR #4E-800-0070-10

Please use the space below to briefly describe the incident or action that prompted you to seek EEO counseling at this time.

On _____ Month, Day, 20__ Year

See Attachment

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MG

PS Form 2564-A, March 2001 (Page 1 of 2)

MG Harrington
EXHIBIT NO. 25
6-18-12

Counselor's Report Page 11 of 22

Explain why, based on the factors you cited in Section B, you believe that you were treated differently than other employees or applicants in similar situations

1. _____ _____
(Name of Employee) Factor(s) that describe the employee, i.e., race (black), National Origin (Hispanic)
was treated differently than I when: _____

2. _____ _____
(Name of Employee) Factor(s) that describe the employee, i.e., sex (male), National Origin (Hispanic)
was treated differently than I when: _____

3. _____ _____
(Name of Employee) Factor(s) that describe the employee, i.e., race (black), National Origin (Hispanic)
was treated differently than I when: _____

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List the name(s) of the official(s) who took the action that prompted you to seek counseling at this time.

1a. Name DAVID KNIGHT CHARMAINE EHRENSHAFT	b. Title MANAGER HR MANAGER LABOR RELATION
c. Office COLORADO/WYOMING DISTRICT	d. Grade Level EAS-25 EAS-22
2a. Name JARMAN SMITH	b. Title MANAGER POST OFFICE OPERATION
c. Office COLORADO/WYOMING DISTRICT	d. Grade Level EAS-25

Retaliation Allegations Only: Was/were the official(s) listed in Section D above aware of your prior EEO activity?
☐ No ☐ Yes If yes, explain how the official(s) became aware: N/A

What are you seeking as a resolution to your pre-complaint?

See Attachment

Amt.

On the incident that prompted you to seek EEO counseling, have you:

1. Filed a grievance on the same issue? ☒ No ☐ Yes If yes, _____ (Date) _____ (Current Step)
2. Filed a MSPB appeal on this issue? ☒ No ☐ Yes If yes, _____ (Date Appeal Filed)

[redacted]

You have the right to remain anonymous during the pre-complaint process.

Do you desire anonymity? ☒ No ☐ Yes

[redacted]

You have the right to retain representation of your choice. (check one)

☐ I waive the right to representation at this time. ☒ I authorize the person listed below to represent me.

Name of Representative	Representative's Title
JOHN MOSBY	ATTORNEY AT LAW
Organization	**Telephone Number** / **Email Address***
	303-623-1355 / JOHN_MOSBY@MSN.COM

Mailing Address (Street or P.F. Box, City, State and Zip +4)

621 17TH STREET SUITE 1035 DENVER, CO 80293-1000

* Providing this information will authorize the U.S. Postal Service to send your representative important documents electronically.

[redacted]

Please attach any documentation you wish to submit to support your allegation(s). Include a copy of any written action(s) that caused you to seek counseling at this time.

Note: If you are alleging mental and/or physical disability, it is important for you to submit medical documentation of your disability during the pre-complaint process.

[redacted]

Privacy Act Notice. The collection of this information is authorized by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16; the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a; the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794a; and Executive Order 11478, as amended. This information will be used to adjudicate complaints of alleged discrimination and to evaluate the effectiveness of the EEO program. As a routine use, this information may be disclosed to an appropriate government agency, domestic or foreign, for law enforcement purposes; where pertinent, in a legal proceeding to which the USPS is a party or has an interest; to a government agency in order to obtain information relevant to a USPS decision concerning employment, security clearances, contracts, licenses, grants, permits or other benefits; to a government agency upon its request when relevant to its decision concerning employment, security clearances, security or suitability investigations, contracts, licenses, grants or other benefits; to a congressional office at your request, to an expert, consultant or other person under contract with the USPS to fulfill an agency function; to the Federal Records Center for storage; to the Office of Management and Budget for review of private relief legislation; to an independent certified public accountant during an official audit of USPS finances; to an investigator, administrative judge or complaints examiner appointed by the Equal Employment Opportunity Commission for investigation of a formal EEO complaint under 29 CFR 1614; to the Merit Systems Protection Board or Office of Special Counsel for proceedings or investigations involving personnel practices and other matters within their jurisdiction; and to a labor organization as required by the National Labor Relations Act. Under the Privacy Act provision, the information requested is voluntary for the complainant, and for Postal Service employees and other witnesses.

[redacted]

I am aware that the claim(s) contained herein shall by-pass the pre-complaint process *if* like or related to a formal complaint that I have already filed, or *if* the claim(s) constitutes a spin-off complaint. (A spin-off complaint consists the manner in which a previously filed complaint is being processed.) In completing this PS Form 2564-A, *Information for Pre-complaint Counseling*, I recognize that the Manager, Dispute Resolution will review the claim(s) contained herein and determine how they shall be processed. I will be notified, in writing, if the Manager determines that my claim(s) shall be processed as amendments or appendages to a formal complaint that I have already filed.

Please print your name here

MARVIN GREEN

Your Signature

Marvin Green

Date signed

03/31/2010

Please return this form to:

National EEO Investigative Services Office
EEO Contact Center
U.S. Postal Service
PO Box 21979
Tampa FL 33622-1979

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PS Form 2564-A, March 2001 *(Page 3 of 3)*

Counselor's Report
Page 13 of 17

EEO Forced Retirement March 31, 2010:

C. Description of Incident/Action

Since filling my charges of discrimination the Agency has engaged in harassing, bulling and attempting to force me to quit or retire. I was forced out of my job as Postmaster Englewood, CO EAS-22, by David Knight, Charmaine Ehrenshaft, and Jarman Smith or to move to the state of Wyoming about 400 miles from Denver, CO for a Postmaster position EAS-13 without save pay which would be a cut in pay of approximately $38,784.00 dollars and without any relocation cost. They also stopped my 2009, Pay-For-Performance Salary Increase that should have taken place in the month of January 2010. On December 19, 2009, David Knight, Charmaine Ehrenshaft, and Jarman Smith downgraded me to an EAS-13 Postmaster Wamsutter, Wyoming. They also used bulling, harassment, intimidation by possible criminal charges for delay of mail which I never delayed any mail in my Postal Career.

Alternatively, if I did not retire, a Criminal Attorney would cost me to start any where from $25,00.00 to $50,000.00, or if I did not retire, I was ordered to report to the Postmaster position in Wamsutter, Wyoming which is approximately 400 miles from Denver, CO, and be downgraded from a level EAS-22 to a level EAS-13, without saved pay.

F. Resolution

I am seeking full relief, including being reinstated back to full duty, promoted to the position of EAS-24 Postmaster and lost wages, attorney fees and compensatory damages.

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No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN, Postmaster General,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Under federal employment discrimination law, does the filing period for a constructive discharge claim begin to run when an employee resigns, or at the time of an employer's last allegedly discriminatory act giving rise to the resignation?

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BRIEF FOR PETITIONER

Petitioner Marvin Green respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a) is published at 760 F.3d 1135. The opinion of the district court (Pet. App. 28a) is unpublished but is available at 2013 WL 424777.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2014. Pet. App. 1a. Justice Sotomayor granted an extension of time within which to file a petition for a writ of certiorari to and including November 26, 2014. 14A368. The petition was filed on November 25, 2014, and granted on April 27, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 2000e-3(a) provides in relevant part that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

29 C.F.R. § 1614.105(a)(1) provides that "[a]n aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action."

STATEMENT OF THE CASE

This case concerns a timeliness defense asserted by the Postal Service to defeat petitioner Marvin Green's constructive discharge claim.

A. Legal Background

1. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2. Title VII also provides employees who advance discrimination complaints "broad protection from retaliation" by their employers. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006); *see* 42 U.S.C. § 2000e-3(a).

Furthermore, to ensure that employers cannot "accomplish indirectly what the law prohibits being done directly" – namely, circumvent various prohibitions against firing employees for discriminatory or retaliatory reasons – Title VII recognizes claims for constructive discharge. 1 Barbara T. Lindemann et al., *Employment Discrimination Law* 21-33 (5th ed. 2012). This doctrine treats "an employee's reasonable decision to resign because of unendurable working conditions" as a termination by the employer. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894 (1984). The doctrine

traces its roots to the 1930s, when it proved necessary to resolve labor disputes in which employers retaliated against employees by creating intolerable working conditions. *Suders*, 542 U.S. at 141. By the time Congress began enacting statutes prohibiting employment discrimination in the 1960s, the claim was "solidly established in the federal courts" and was applied in these new statutory contexts. *Id.* at 141-42.

2. A constructive discharge claim "involves both an employee's decision to leave and precipitating conduct." *Suders*, 542 U.S. at 148; *accord* 2 *EEOC Compliance Manual* § 612.9(a) (2008). At its heart, the claim turns on whether the employee's resignation should be treated as a termination. "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Suders*, 542 U.S. at 141. Because a constructive discharge is treated as a termination, employees who prove a constructive discharge may recover "all damages available for formal discharge . . . including both backpay and, in fitting circumstances, frontpay." *Id.* at 147 n.8.

Just as a claim for wrongful termination cannot be brought before an employee has been fired, a claim for constructive discharge cannot be brought until an employee has quit, *see Ekstrand v. Sch. Dist. of Somerset*, 583 F.3d 972, 978 (7th Cir. 2009);

Lindemann, *supra*, at 21-46. Prior to an employee's resignation no cause of action exists, and any suit brought before resignation will fail to state a claim.[1]

3. Title VII generally requires employees first to pursue their grievances through administrative channels before turning to the courts. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Employees therefore bring thousands of constructive discharge claims to the federal Equal Employment Opportunity Commission (EEOC) every year.[2] These administrative redress procedures form part of a system "in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972).

This system includes several time windows. To initiate a claim, federal employees are required to report discrimination to an EEO counselor within 45 days of the matter that the employee alleges was unlawful.[3] This report – the timeliness of which is at

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[1] *See, e.g.*, *EEOC v. La Rana Hawaii, LLC*, 888 F. Supp. 2d 1019, 1047 (D. Haw. 2012); *Mills v. Willams*, 476 F. Supp. 2d 653, 663 (E.D. Mich. 2007), *aff'd* 276 F App'x 417 (6th Cir. 2008).

[2] *See* EEOC, *Statutes by Issue FY 2010 – FY 2014*, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited July 2, 2015).

[3] Federal employees, such as petitioner Marvin Green, pursuing claims under Title VII "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action." 29 C.F.R.

issue in this case, *see* Pet. App. 9a, 15a-16a – sets in motion a multi-stage process. If the discrimination claim is not resolved at the initial stage, the EEO counselor must inform the employee within 30 days of the initial meeting that the employee may file a formal complaint. 29 C.F.R. § 1614.105(d). The employee then has 15 days to file a formal complaint. *Id.* Generally, the agency then has 180 days to complete an investigation of the complaint. *Id.* § 1614.108(e), (f). The employee then has 30 days after receiving the investigative file to request a final decision from the agency or review of the complaint before an administrative judge. *Id.* § 1614.108(f). The employee generally has 90 days from a final adverse administrative decision to sue in federal district court. 42 U.S.C § 2000e-16(c).

A claimant's failure to initiate any stage of this process within the applicable timeframe creates a nonjurisdictional bar to any later suit. *See, e.g.*, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

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§ 1614.105(a)(1). In the private sector, "[a] charge . shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred," or, if state proceedings are also initiated, "within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier." 42 U.S.C. § 2000e-5(e)(1).

B. Factual And Procedural Background

1. In 2008, Mr. Green, then postmaster for Englewood, Colorado, applied for a promotion. Pet. App. 29a. Building on a 35-year career in which he began as a letter carrier and rose through the ranks of the Postal Service, Mr. Green sought to fill a recently vacated postmaster position in nearby Boulder, Colorado. J.A. 9-10 (¶¶ 8-13); Pet. App. 3a. Despite an unblemished record, he was passed over for the job. Pet. App. 3a. Mr. Green, who is black, thereafter contacted a Postal Service EEO counselor, alleging that he was denied the promotion because of his race. *Id.*; J.A. 12 (¶¶ 28-29).

Relations with his supervisors soured in the wake of that discrimination complaint. Pet. App. 3a; J.A. 12-14. In 2009, while his complaint proceeded through administrative channels, Mr. Green expressed concern that he was the victim of retaliation, twice more seeking help from Postal Service EEO counselors. Pet. App. 3a. In November of that year, shortly after the EEOC assigned an administrative law judge to oversee discovery concerning his original nonpromotion claim, *see* J.A. 15 (¶ 51); CA10 App. 673-77, Mr. Green received a letter from his Postal Service superiors summoning him to appear for an "investigative interview" and indicating that he could have a representative with him, J.A. 15 (¶ 52); CA10 App. 433.

At that meeting, held on December 11, 2009, Postal Service supervisors confronted Mr. Green with various allegations, most seriously accusing him, without any prior notice, of "intentionally delaying the mail" – a criminal charge. J.A. 16 (¶ 59); *see* J.A.

58-59. They informed him that they had contacted the Postal Service's Office of the Inspector General (OIG) about the mail-delay charge and that OIG agents had just arrived to interview him as part of their investigation. Pet. App. 4a. Mr. Green's supervisors then reassigned him, effective immediately, to "Emergency Placement in Off-Duty Status," citing his alleged "[d]isruption of day-to-day postal operations." J.A. 17 (¶ 71); CA10 App. 600. They suspended his pay and informed him that he could not return to duty until "the cause for nonpay status cease[d]." J.A. 17 (¶ 71).

Rattled, Mr. Green sought help from his union representative, who entered into a flurry of negotiations with a Postal Service senior human resources manager, David Knight. Pet. App. 5a. While the negotiations unfolded, Mr. Green remained without pay, on indefinite leave, and, he believed, under threat of criminal prosecution.

In fact, "[u]nknown to Green, the OIG agents had concluded at the end of the [December 11] interview that Green had not intentionally delayed the mail." Pet. App. 5a. Nevertheless, the next day, Mr. Knight told Mr. Green's representative that "the OIG is all over this" and the charge is a "criminal issue" that "could be a life changer." J.A. 53.

After several days of back-and-forth, an agreement was signed on December 16, 2009. Pet. App. 5a. In exchange for a promise by the Postal Service not to pursue criminal charges, Mr. Green agreed to "relinquish" his current post and choose one of two alternatives. J.A. 60. First, he could leave Englewood (part of the Denver metropolitan area)

and accept a position in Wamsutter, Wyoming (population 451) at a salary approximately $40,000 less than he currently earned. *Id.* 60, 67. Second, he could tender his resignation and leave the Postal Service entirely. *Id.* 60. In other words, Mr. Green "could choose either to retire or to work in a position that paid much less and was about 300 miles away." Pet. App. 2a.

The agreement expressly provided Mr. Green with time to contemplate the decision. J.A. 60. The Postal Service agreed to end Mr. Green's emergency placement and allowed him to use his accumulated annual and sick leave to receive his then-current salary through the end of March. *Id.* At that point, the agreement required him to either "report for duty in Wamsutter . . . on April 1" or "take all necessary steps to effect his retirement on or before March 31." *Id.*

After spending January going through the Postal Service's internal EEO process to challenge the original emergency placement decision – without success – Mr. Green submitted his resignation on February 9, effective on the last day of March. Pet. App. 6a.

2. On March 22, 41 days after resigning, Mr. Green contacted an EEO counselor to report his constructive discharge. Pet. App. 6a. He contended that his supervisors had threatened criminal charges – and negotiated the resulting agreement – in retaliation for his original discrimination complaint. J.A. 67. Given the choice he had to make, Mr. Green alleged that he had been forced to resign in violation

of Title VII. *Id.* 64-67. The agency accepted the complaint for investigation. Pet. App. 6a-7a.

The parties agree that Mr. Green's complaint of constructive discharge, if timely under the applicable 45-day rule, properly initiated the EEO process. They also agree that Mr. Green thereafter timely pursued the remaining administrative remedies available to him. J.A. 19 (¶¶ 83-85); *id.* 48 (¶¶ 83-85). The administrative process did not resolve the dispute.

3. Mr. Green then filed suit in the District of Colorado against respondent, the Postmaster General. Mr. Green alleged, in five distinct causes of action, unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964. Pet. App. 7a.

Regarding the only cause of action at issue here – constructive discharge – the district court found that the 45-day filing period was triggered not when Mr. Green resigned, but rather when both parties signed the earlier, December 16 settlement agreement. Pet App. 37a-39a. The court reasoned that the Postal Service's conduct had "culminated" at that point, even though Mr. Green had not decided to resign. *Id.* Because Mr. Green had not initiated contact with an EEO counselor on his constructive discharge claim within 45 days of that date, the court held, his claim was time-barred. *Id.*

4. The Tenth Circuit affirmed. The court of appeals recognized that other circuits had held that the filing period begins "on the date the employee resigned." Pet. App. 19a. And it acknowledged that a claim for constructive discharge "cannot be submitted before the employee quits his job." *Id.* 22a.

But concerned that the other circuits' position would "allow[] the employee to extend the date of accrual indefinitely," the Tenth Circuit rejected the date-of-resignation rule. Pet. App. 20a-22a. Instead, it held as a general proposition that the filing period for a constructive discharge claim begins to run from the time of the employer's alleged "last discriminatory act" said to give rise to the resignation, not from the resignation itself. Pet. App. 15a-23a. And finding that the Postal Service's last relevant act had occurred on or before December 16, when the Postal Service signed the settlement agreement, the court of appeals held that Mr. Green's March 22 contact with an EEO counselor was outside the 45-day limitations period. *Id.* 23a.

SUMMARY OF THE ARGUMENT

The filing period for a constructive discharge claim begins to run when an employee resigns.

I. Limitations periods generally do not run until a cause of action exists, and there is no basis for deviating from that general rule here.

A. This Court has long recognized that, absent clear textual indications to the contrary, limitations periods begin to run only once a plaintiff can file a claim and obtain relief. When the text creating a filing period is ambiguous, the Court will apply this general rule and construe the limitations period to begin only when the cause of action is complete.

B. In constructive discharge cases, the cause of action does not become complete until the claimant resigns. Therefore, the limitations period runs from the date of resignation, unless the operative text

demonstrates clear intent to the contrary. Here, it does not. The relevant regulation provides that the period runs from the date of the "matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1). With respect to constructive discharge, the "matter" necessarily culminates with the employee's resignation.

Any other construction would flout the judicial consensus that the regulation here is a statute of limitations, not a statute of repose. Statutes of limitations begin to run only when a cause of action is complete and are subject to equitable tolling. Statutes of repose, by contrast, begin to run at the last act of a defendant and are not subject to tolling under any circumstances. The Tenth Circuit's last-discriminatory-act rule – which treats the regulation as if it were a statute of repose – contravenes the consensus that the regulation here is a statute of limitations subject to equitable tolling.

C. In analogous situations where the claimant's decision to end a relationship completes the cause of action, the general rule prevails. In suits for constructive termination of a franchise or constructive eviction of a tenant, both the cause of action accrues and the limitations period begins when the plaintiff, under duress, chooses to end the relationship. And in state-law constructive discharge cases, nearly all courts to address the issue hold that the limitations period begins when the cause of action is complete.

II. The date-of-resignation rule comports with this Court's decisions concerning the timeliness of other kinds of Title VII claims. *Delaware State*

College v. Ricks, 449 U.S. 250 (1980), held that the filing period in a formal discharge claim begins when termination of the employee becomes inevitable. In a constructive discharge claim, an employee must resign before termination is inevitable. Thus, resignation is the first date at which the filing period can run consistent with *Ricks*. Moreover, *National Railroad Passenger Co. v. Morgan*, 536 U.S. 101 (2002), held that where an employment claim involves multiple components, the most recent event contributing to the claim triggers the filing period. Similarly, because a constructive discharge includes both precipitating conduct and the employee's subsequent resignation, the resignation triggers the filing period.

III. The date-of-resignation rule furthers Title VII's goals by promoting administrable rules for adjudicators, fairness for laypeople, and conciliation between employers and employees.

A. This Court construes statutes of limitations to provide clarity at the outset of litigation. The date-of-resignation rule does just that, offering a discrete, readily identifiable event that triggers the limitations period. By contrast, the Tenth Circuit's last-discriminatory-act rule would force courts to determine which "acts" are sufficiently "discriminatory" to trigger the limitations period. This would be a difficult task. Courts might look to this Court's substantive discrimination jurisprudence, but determining whether an employer's conduct affected the terms, conditions, or privileges of employment is challenging, particularly in hostile work environment cases, where not all allegedly discriminatory conduct is independently

actionable. Likewise, in retaliation cases, courts would have to determine whether an employer's act would tend to discourage reporting in light of the unique circumstances, expectations, and relationships existing in a given workplace. This complexity is unnecessary because the simpler date-of-resignation rule provides a better alternative.

B. The date-of-resignation rule also promotes fairness in an administrative system designed to accommodate unrepresented lay claimants. A last-discriminatory-act rule would result in employees unwittingly forfeiting constructive discharge claims, because they are unlikely to know that the filing period to allege constructive discharge could begin, let alone end, before they resign. The ability to amend prior complaints is no panacea for several reasons, including that claimants with standalone constructive discharge claims will have no prior complaints to amend.

C. The date-of-resignation rule also promotes conciliation between employers and employees without encouraging inappropriate delay. Due to habit, financial necessity, or optimism, some employees will attempt to persevere on the job and make good-faith efforts to reconcile with employers despite objectively intolerable conditions. But a last-discriminatory-act rule would encourage these employees to file complaints and quit immediately after employer misconduct to avoid a time bar. The date-of-resignation rule, by contrast, gives employees time to try to work out disagreements without resorting immediately to resignation.

ARGUMENT

The filing period for constructive discharge claims under Title VII begins to run when an employee resigns. Petitioner Marvin Green resigned on February 9, 2010, and contacted an EEO counselor 41 days later. His constructive discharge claim is therefore timely and should be heard on its merits.

I. Consistent With The General Rule, The Filing Period For A Constructive Discharge Claim Does Not Begin Until All Elements Of The Claim Are Present.

A. Absent Clear Textual Indications To The Contrary, Limitations Periods Do Not Commence Until A Claimant Can File A Claim And Obtain Relief.

1. This Court has "repeatedly recognized that Congress legislates against the standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005) (internal quotation marks omitted). Unless the text creating a limitations period clearly indicates otherwise, "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)). Thus, in nearly all cases, limitations periods do not begin to run until all elements of a claim are present.

This default rule has its origins in the first statute of limitations for personal actions enacted in England, 21 Jac. 1, c. 16 (1623), and was incorporated early on into American law. From the mid-nineteenth century, it was widely recognized that limitations periods begin to run only "when and as soon as the party has a right to apply to the proper tribunals for relief." *See Angell on Limitations* 41 (1846); *accord* 2 *Story on Equity Jurisprudence* § 1521(a) (1853). In *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583 (1874), this Court stated the rule without qualification: "All statutes of limitation begin to run when the right of action is complete." *Id.* at 589.

The general rule exists in part because "[i]t would clearly be unfair to charge the plaintiff with the expiration of any time before the plaintiff's cause of action could be prosecuted to a successful conclusion." 1 Calvin W. Corman, *Limitation of Actions* § 6.1 (1991). Far from "encourag[ing] the prompt presentation of claims," *United States v. Kubrick*, 444 U.S. 111, 117 (1979), a statute of limitations that began to run before a cause of action existed could bar even claims that are brought forward immediately.

3. Although it is "theoretically possible" to create a limitations period that begins before a claimant can obtain relief, courts "will not infer such an odd result in the absence of any such indication in the statute." *Reiter v. Cooper*, 507 U.S. 258, 267 (1993). This Court recognizes that drafters have been "operating against the background rule . . . for a very long time" and that when Congress "has wanted us to apply a different rule . . it has said so." *TRW Inc. v.*

Andrews, 534 U.S. 19, 38 (2001) (Scalia, J., concurring in the judgment).

Thus, when the text creating a filing period is unclear, the Court will defer to the general rule and "adopt the construction that starts the time limit running when the cause of action . . . accrues." *Graham Cnty.*, 545 U.S. at 419; *see also Johnson v. United States*, 544 U.S. 295, 308 (2005) (the general rule "should be reconciled with the statutory language if it can be"). In *Graham County*, for example, the Court faced text that was "ambiguous." 545 U.S. at 417. Under one of two "reasonable readings," the time period could run before the relevant claim existed, thus allowing the action "to be time barred before it ever accrue[d]." *Id.* at 415, 421. Absent clear evidence that Congress had intended such "counterintuitive results," the Court chose the reading that followed the general rule. *Id.* at 421.

This Court has applied a different rule only rarely, when the text of a provision or the record of its enactment leaves no doubt about the drafters' intent – for example, when the parties contracted unambiguously to allow the clock to run before the plaintiff could obtain relief, *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 610 (2013), or when the statutory text unmistakably demanded a different starting point, *Dodd v. United States*, 545 U.S. 353, 358 (2005) (construing the limitations provision of the federal habeas statute, under which the period runs from this Court's initial recognition of the right asserted).

B. The Regulation Here Comports With The General Rule That Limitations Periods May Not Run Until A Claim Accrues.

1. Because a cause of action for constructive discharge exists only once a claimant resigns, *see supra* at 3-4, the general rule dictates that the filing period for constructive discharge should run from the date of resignation, barring an unambiguous textual provision to the contrary.

The relevant statute, 42 U.S.C. § 2000e-16(b), does nothing to override the general rule, but merely authorizes the EEOC to issue regulations to implement Title VII's protections for federal employees. And far from establishing an intent to upend settled practice, the relevant EEOC regulation is consistent with the general rule. That regulation, 29 C.F.R. § 1614.105(a)(1), provides that an "aggrieved person" has 45 days to file a claim from the date of a "matter alleged to be discriminatory." *Id.* The Tenth Circuit, however, ignored the words "matter alleged" and instead held that the limitations period runs from the defendant's last allegedly discriminatory "act," Pet. App. 20a, a word appearing nowhere in the regulation.

A "matter" refers to more than just a particular "act"; rather, it broadly describes the "subject under consideration." *Black's Law Dictionary* 1126 (10th ed. 2014); *see also Black's Law Dictionary* 978 (6th ed. 1990) ("Substantial facts forming basis of claim."); IX *Oxford English Dictionary* 481 (2d ed. 1989) ("Something which is to be tried or proved."). Where a claimant seeks to prove constructive discharge, the subject under consideration necessarily comprises

resignation, not just an employer's earlier acts. *See Ekstrand v. Sch. Dist. of Somerset*, 583 F.3d 972, 978 (7th Cir. 2009) ("[T]here couldn't have been a constructive discharge while the employment relationship continued."); Pet. App. 22a. Thus, in constructive discharge, a "matter" alleged to be discriminatory includes resignation.

Similarly, by using the phrase "matter *alleged*," the regulation focuses on the employee's grievance and ensures that the complainant is "the master of the claim" with the right to define the legal matter to be adjudicated. *Cf. Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (plaintiffs may choose which laws to rely on in their pleadings). Because claimants cannot properly "allege" constructive discharge before they resign, a rule that could time-bar constructive discharge claims prior to resignation would prevent some claimants from alleging the legal matter they want adjudicated.

In any case, even if the Tenth Circuit were correct that a "matter alleged" was equivalent to a particular "act," an employee's resignation in the face of intolerable circumstances is, itself, a "distinct discriminatory 'act' for which there is a distinct cause of action." *Young v. Nat'l Ctr. For Health Servs. Research*, 828 F.2d 235, 238 (4th Cir. 1987). Because a resignation is the final necessary element of a constructive discharge, it is the act that triggers the filing period for that claim.

2. The date-of-resignation rule comports with the distinction this Court has drawn between statutes of limitations and statutes of repose.

a. This Court has recognized that statutes of limitations and statutes of repose are fundamentally different. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014). Statutes of limitations measure time from the date the plaintiff's cause of action accrues and are subject to equitable defenses such as tolling. *Id.*; *see also, e.g., Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94-95 (1990); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). In contrast, statutes of repose measure time from the date of the defendant's last relevant act (such as manufacturing or selling a particular product), regardless of whether the plaintiff's claim has accrued, and are not subject to equitable tolling under any circumstances. *Waldburger*, 134 S. Ct. at 2182.

The two key distinctions between statutes of limitations and statutes of repose – when the clock starts running and whether the clock may be paused – reflect the same underlying difference in purpose. *See Waldburger*, 134 S. Ct. at 2183. Because statutes of limitations exist in part to encourage *plaintiffs* to seek remedies on a timely basis, they run only once relief is available to the plaintiff and may be paused if fairness to the plaintiff warrants it. *Id.* Statutes of repose, by contrast, exist solely to protect *defendants* – and thus measure time only from the defendant's acts and continue to run regardless of the plaintiff's misfortune. *Id.*

b. All courts agree that 29 C.F.R. § 1614.105(a)(1) functions as a statute of limitations – not as a statute of repose – when assessing the availability of equitable defenses. In *Zipes*, 455 U.S. 385, this Court held that the filing period for private

sector Title VII administrative claims was "like a statute of limitations . . . subject to waiver, estoppel, and equitable tolling." *Id.* at 393. By 1990, all ten circuits to consider the issue had applied *Zipes* to the equivalent federal sector period at issue here and held that it too was a statute of limitations subject to tolling. *See Rennie v. Garrett*, 896 F.2d 1057, 1059-60, 1062 (7th Cir. 1990) (collecting cases). And two years later, the EEOC codified the availability of standard equitable defenses in the regulation itself. 29 C.F.R. § 1614.604(c); *see* 57 Fed. Reg. 12634, 12662 (April 10, 1992).

The Tenth Circuit's holding runs headlong into this consensus because it interpreted 29 C.F.R. § 1614.105(a)(1) as if it were a statute of repose. A "distinguishing feature" of statutes of repose is that their filing periods "begin[] when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." 54 C.J.S. *Limitations of Actions* § 7 (2010); *accord Waldburger*, 134 S. Ct. at 2187-88. By causing the regulation to function as a statute of repose for one purpose (when the filing period begins), and as a statute of limitations for another (whether equitable defenses are available), the court of appeals' last-discriminatory-act standard contravenes the "clear distinction" between statutes of limitation and statutes of repose, *id.* at 2186.

C. In Other Situations Where A Claimant's Conduct Completes The Cause Of Action, Courts Hold That The Limitations Period Does Not Begin To Run Until The Cause Of Action Exists.

In constructive discharge cases, the claimant's conduct completes the cause of action. *See Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004). In other areas where this occurs, courts routinely find that the limitations period does not begin before a claimant can seek relief.

1. Courts that recognize "constructive termination" allow franchisees who are "compelled . . . to abandon their franchises" by a franchisor's wrongful conduct to sue as though the franchisor had ended the relationship. *See Mac's Shell Services, Inc. v. Shell Oil Products Co.*, 559 U.S. 175, 177-78 (2010). In *Mac's Shell*, the Court rejected an attempt by gas station franchisees to bring claims for constructive termination under the Petroleum Marketing Practices Act while the franchisees "continue[d] operating a franchise." *Id.* at 178, 182-84. Just as an employee must "quit his or her job" before claiming constructive discharge, the Court reasoned, franchisees cannot sue for constructive termination until they actually "abandon their franchises." *Id.* at 184.

In support of its holding, the Court rebuffed an argument that the applicable statute of limitations could run from a franchisor's wrongful act committed prior to a franchise's termination – a standard similar to the Tenth Circuit's last-discriminatory-act rule. *Mac's Shell*, 559 U.S. at 189-90; *see* Br. of

Petrs. 22, *Mac's Shell Services, Inc. v. Shell Oil Products Co.*, 559 U.S. 175 (2010) (No. 08-240), 2009 WL 3391431. Instead, the Court indicated, the limitations period for constructive termination could not run until the franchise relationship formally ended. *Id.*[4] Because this is the same moment at which a claim for constructive termination becomes complete, the Court's decision confirms – in keeping with the general rule – that the statute of limitations in constructive termination cases cannot begin to run before a claim exists.[5]

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[4] In *Mac's Shell*, the limitations period ran from "(1) 'the date of termination of the franchise' or (2) 'the date the franchisor fails to comply with the requirements of' the Act." 559 U.S. at 189 (quoting 15 U.S.C. § 2805(a)). The Court held that the second limitations period applied only to franchisors' "post-termination violations," *id.* at 190, meaning that the earliest the limitations period could begin to run was from termination of the franchise. *Id.* 189-90.

[5] Indeed, at oral argument in *Mac's Shell*, the Government (as amicus supporting respondent Shell Oil Products Co.) maintained that the general rule applies in both the constructive termination *and* constructive discharge contexts. *See* Tr. of Oral Arg. at 21, *Mac's Shell Services, Inc. v. Shell Oil Products Co.*, 559 U.S. 175 (2010) (No. 08-240) (Justice Sotomayor: "At what point would the statute of limitations begin to run . . ?" Mr. O'Neill (on behalf of the United States): "When the franchisee is actually forced to end one of the statutory elements of the franchise in response to the franchisor's conduct. And that's the same test that would be applied in the constructive discharge or constructive eviction context.").

2. Similarly, "landlord-tenant law has long recognized the concept of constructive eviction," in which tenants who are wrongfully coerced into vacating property may sue as though they were evicted. *See Mac's Shell*, 559 U.S. at 184. Again, as with constructive discharge, claims for constructive eviction do not accrue until tenants "actually move out," *id.* And consistent with the general rule, the statute of limitations does not begin to run until a cause of action for constructive eviction exists. *See Nat'l R.R. Passenger Corp. v. Notter*, 677 F. Supp. 1, 4 (D.D.C. 1987).

3. Many states recognize constructive discharge in the context of state common law and statutory wrongful employment termination claims. In those cases, seven of the eight state courts of last resort to address the issue follow the general rule by holding that the limitations period begins at the same time an employee's cause of action accrues – whether that happens at or after resignation – while only one holds to the contrary.[6]

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[6] *See Mullins v. Rockwell Int'l Corp.*, 936 P.2d 1246, 1253 (Cal. 1997); *Patterson v. State Dep't of Health & Welfare*, 256 P.3d 718, 725 (Idaho 2011); *Whye v. City Council for the City of Topeka*, 102 P.3d 384, 387 (Kan. 2004); *Hancock v. Bureau of Nat'l Affairs, Inc.*, 645 A.2d 588, 590 (D.C. 1994); *Jeffery v. City of Nashua*, 48 A.3d 931, 936 (N.H. 2012); *Douchette v. Bethel Sch. Dist. No. 403*, 818 P.2d 1362, 1367 (Wash. 1991); *see also Stupek v. Wyle Labs. Corp.*, 963 P.2d 678, 682 (Or. 1998) (limitations period began to run at employee's last day of employment, where cause of action existed only once plaintiff

II. The Date-Of-Resignation Rule Is Consistent With This Court's Decisions Regarding The Timeliness Of Other Types of Title VII Claims.

In rejecting the date-of-resignation rule, the Tenth Circuit asserted that *Delaware State College v. Ricks*, 449 U.S. 250 (1980), demands a focus on "the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." Pet. App. 20a (emphasis and internal quotation marks omitted) (quoting *Ricks*, 449 U.S. at 258). But that application of *Ricks* was mistaken. *Ricks* supports the view that the filing period for a constructive discharge claim may not begin until an employee resigns.

In *Ricks*, the plaintiff, a college teacher, was denied tenure – first by the college's tenure committee, whose recommendation was then approved by the Faculty Senate. *Id.* at 252. The Board of Trustees then "formally voted" to deny tenure and offered the plaintiff a terminal one-year contract. *Id.* at 252. This Court held that the filing period for the plaintiff's formal discharge claim began

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was no longer employed); *cf. Joliet v. Pitoniak*, 715 N.W.2d 60, 68 (Mich. 2006) (limitations period began to run at employer's last act, but only where constructive discharge was "not a cause of action" under state law). *But see Harmon v. Higgins*, 426 S.E.2d 344, 347 (W. Va. 1992) (acknowledging the general rule, but holding that the limitations period began to run at date of employer's "last offensive contact").

to run when the employer stated its "official position" and "termination of employment" becomes "inevitable." 449 U.S. at 257-58. Applying that rule, this Court accepted the date on which tenure was formally denied and the terminal contract offered as the date on which the filing period began to run. *See id.* at 261-62. The limitations period did not start when termination first became possible, or even probable.

By this logic, the filing period in constructive discharge cases likewise starts only when the employee's separation from employment becomes inevitable. In constructive discharge cases, "discharge" is not inevitable until the employee's "decision to leave." *See Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004). Indeed, as this Court has put it, in a constructive discharge claim, the acts of an employer are only "precipitating conduct" to the employee's decision to resign. *Id.*

The EEOC agrees. As the Commission has explained in applying *Ricks* to a constructive discharge claim, when an employee is given an *option* to retire, "the decision to terminate is tentative; *the employee himself* can avoid the adverse employment decision by accepting the [other] option." Br. of the EEOC as Amicus Curiae in Support of the Appellant at *11 & n.2, *Bailey v. United Airlines, Inc.*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245. The EEOC therefore concluded that constructive discharge claims accrue "on the date on which [the plaintiff] informed [the defendant] of his intention to accept the resignation option." *Id.* at *9-10; *see also [Anonymous] v. Shinseki*, EEOC Doc. No. 0120141607, 2014 WL 3697473 (July 18, 2014).

These views of the EEOC – which has been charged by Congress with interpreting and enforcing Title VII – are "entitled to respect," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 (2002) (EEOC interpretations entitled to *Skidmore* deference).

The date-of-resignation rule finds further support in *Morgan*. There, this Court explained that the appropriate starting point for limitations periods "varies with the [employment] practice" at issue. *Morgan*, 536 U.S. at 110. *Morgan* dealt with a hostile work environment claim, which is "different in kind from discrete acts," *id.* at 115, because it "is composed of a series of separate acts that collectively constitute one 'unlawful employment practice,'" *id.* at 114, 117 (quoting 42 U.S.C. § 2000e-5(e)(1)). Because many acts of the employer may contribute to a hostile environment and thus "encompass[] a single unlawful employment practice," the most recent event "contributing to the claim" triggers the filing period. *Id.* at 117-18.

Likewise here, as this Court has recognized, a constructive discharge is composed of multiple acts: "both an employee's decision to leave and precipitating conduct." *Suders*, 542 U.S. at 148. Accordingly, resignation triggers the filing period for a constructive discharge claim.

III. The Date-Of-Resignation Rule Furthers Title VII's Goals Of Administrability, Fairness, And Conciliation.

A. The Date-Of-Resignation Rule Is Easy To Administer.

1. This Court has recognized that "the legislative purpose to create an effective remedy" is frustrated by "uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters." *Wilson v. Garcia*, 471 U.S 261, 275 (1985). Needlessly complicated limitations analyses are "costly to all parties," because plaintiffs "may be denied their just remedy" if they anticipate the wrong statute of limitations, while defendants "cannot calculate their contingent liabilities" without knowing when claims will expire. *Id.* at 275 n.34.

In the Title VII context, administrability is particularly important, as thousands of complaints are considered each year by administrative agencies (and many, thereafter, by federal courts). In 2014, for example, the EEOC received more than 4,000 constructive discharge complaints under Title VII alone.[7]

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[7] EEOC, *Statutes by Issue FY 2010 – FY 2014*, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited July 2, 2015).

Administrability concerns motivated this Court's decision in *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988), which held that a 300-day federal filing window applies to employees who lodge complaints with state fair employment agencies whether their claims are timely under state law or not. *Id.* at 124-25. The Court declined to adopt a requirement that "would embroil the EEOC in complicated issues of state law," observing that the EEOC "has neither the time nor the expertise" to address those issues, and instead embraced a rule that was "both easily understood by complainants and easily administered by the EEOC." *Id.* Likewise here, the date-of-resignation rule is the "simple approach," *Wilson*, 471 U.S at 275 n.34, which is easy to understand and apply.

2. The Tenth Circuit's "last discriminatory act" rule contravenes these principles, requiring a complex inquiry at the outset of constructive discharge cases.

For one thing, pegging the beginning of the filing period to the employer's "last discriminatory act" would require adjudicators, before claims can be heard on their merits, to sift through disputed timelines and contested evidence to determine whether, and exactly when, particular acts took place. *See, e.g.*, *Barone v. United Airlines, Inc.*, 355 Fed. App'x. 169, 173, 184-85 (10th Cir. 2009) (reversing summary judgment in a constructive discharge case by crediting a plaintiff's view of several meetings even though "the timing of these meetings [was] unclear, and the parties dispute[d] [their] substance").

In addition, if the Tenth Circuit's rule were adopted, courts necessarily would struggle to develop a standard (or standards) for what constitutes a "discriminatory act" sufficient to trigger the limitations period. In determining which "acts" count for statute of limitations purposes, courts might consider two existing categories of employment discrimination claims, but neither formulation would provide a sensible way to determine when the clock begins to run in constructive discharge cases.

First, with regard to Title VII's substantive antidiscrimination provision, courts construe the language of the statute itself, which prohibits disparate treatment affecting the "terms, conditions, or privileges of employment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *see also* 42 U.S.C. § 2000e-2(a)(1). Determining what constitutes a term, condition, or privilege of employment can be a difficult task.

For example, when a constructive discharge emerges from an allegedly hostile work environment, a court might have to pick from a series of acts of varying severity to determine whether the discriminatory conduct affected the terms, conditions, or privileges of employment. Assessing when a hostile work environment existed "is not, and by its nature cannot be, a mathematically precise test." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). In fact, "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Meritor*, 477 U.S. at 67. So agency adjudicators and lower courts would struggle to determine whether non-actionable conduct is a

"last act" rising to the level of "discriminatory" solely for the purpose of triggering the constructive discharge filing period.

Second, in retaliation cases, the Court requires conduct that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). This analysis, too, is "simply not reducible to a comprehensive set of clear rules." *Thompson v. N. American Stainless, LP*, 562 U.S. 170, 175 (2011).

If the matter, as in this case, were a retaliatory constructive discharge, a court could be required to ask the highly context-dependent question whether the employer's "last act" would tend to discourage reporting of discrimination given the "constellation of surrounding circumstances, expectations, and relationships." *Burlington Northern*, 548 U.S. at 69 (citation and internal quotation marks omitted). For instance, a "change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children." *Id.* Indeed, in this case, the district court and the court of appeals disagreed over whether Mr. Green's emergency placement was materially adverse under *Burlington Northern*. *See* Pet. App. 24a-26a.

The Tenth Circuit's approach thus would demand "analysis of the particular facts of each claim," which would "inevitably breed[] uncertainty and time-consuming litigation." *Wilson*, 471 U.S. at 273. This Court reached an analogous conclusion in the constructive termination context, finding

"indeterminate and unworkable" a standard that would have required lower courts "to determine whether a breach [by the defendant-franchisor] is serious enough effectively to end a franchise." *Mac's Shell Serv., Inc. v. Shell Oil Products Co.*, 559 U.S. 175, 187 (2010). Accordingly, the Court chose a more administrable standard, finding that constructive termination may occur only when a franchisee actually abandons the franchise. *Id.* at 182-83.

3. When deciding issues of substantive anti-discrimination law, courts sometimes cannot avoid complex questions. But with respect to the threshold timeliness question presented here, choosing among different discrimination standards – each of which would force administrators and courts to decide which acts count for starting the filing period – is unnecessary. Five circuits already have developed an easily administered test: the date-of-resignation rule.[8] Under this test, the limitations period begins with a discrete, readily identifiable act: the employee's resignation. This date-of-resignation analysis mirrors the easily administered date-of-termination rule, which is effective because "[d]iscrete acts such as termination" are "easy to

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[8] *Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998); *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 123 (1st Cir. 1998); *Hukkanen v. Int'l Union of Operating Eng'rs Hoisting & Portable Local No. 101*, 3 F.3d 281, 285 (8th Cir. 1993); *Young v. Nat'l Ctr. For Health Servs. Research*, 828 F.2d 235, 238 (4th Cir. 1987).

identify." *National R. R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Likewise, in constructive discharge cases, the date of resignation will be when the employee gives notice or simply leaves the workplace.

B. The Date-Of-Resignation Rule Promotes Fairness For Lay Claimants.

Under Title VII, "laypersons, rather than lawyers, are expected to initiate the process" of adjudication. *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1988). That being so, a "guiding principle" when construing Title VII is to accommodate laypeople and avoid onerous filing procedures. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982).[9] Clear rules like the date-of-resignation rule further that goal.

"[L]imitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Del. State Coll. v. Ricks*, 449 U.S. 250, 262 n.16 (1980). In *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), for example, this Court declined to

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[9] The EEOC's online overview of the administrative complaint process for federal sector employees is directed at lay claimants and never suggests that a claimant would be represented by an attorney. *See* EEOC, *Overview of Federal Sector EEO Complaint Process*, http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm (last visited July 2, 2015).

construe Title VII to require that an employment discrimination charge be verified within the filing period, in part to "ensure[] that the lay complainant . . . will not risk forfeiting his rights inadvertently." *Id.* at 115.

The Tenth Circuit's last-discriminatory-act standard would result in employees unwittingly forfeiting constructive discharge claims. Especially given the general rule (and reasonable intuition) to the contrary, employees are unlikely to know that their filing period begins before they resign, as this limitation appears nowhere in the relevant statutes and regulations. Even more troubling, a layperson's opportunity to challenge a forced resignation could *end*, as it did here, before his resignation. No reasonable employee would think that his claim for constructive discharge could conceivably lapse before he resigned.

Acknowledging this anomaly, the Tenth Circuit suggested that employees "could likely amend" earlier-filed administrative charges to include a constructive discharge claim. Pet. App. 22a. But the Tenth Circuit's view misconstrues constructive discharge claims. Constructive discharge is *itself* an independent cause of action that does not require a prior discriminatory act rising to the level of an independent Title VII violation. *See Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004). Because a constructive discharge claim will not necessarily be paired with another employment discrimination claim, some constructively discharged employees have no earlier complaints to amend. *See, e.g.*, *Hebert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1112-13 (1st Cir. 1989); *Young v. Nat'l Ctr. For Health*

Servs. Research, 828 F.2d 235 (4th Cir. 1987). And in any event, many laypeople will not know that they must amend, let alone know how.

Furthermore, even if a claimant had filed an earlier administrative complaint and had the wherewithal to try to amend it, an amendment still might not solve the problem. The EEOC informs claimants that "[t]he fact that you filed an earlier charge may not extend the deadline" because "the strict deadlines for filing a charge also apply when you want to amend a charge." EEOC, *After You Have Filed a Charge*.[10] Under the EEOC's standard, even if Mr. Green had immediately filed a discrimination complaint on December 16, he might not have been able to amend that complaint to include constructive discharge, as he resigned 55 days after signing the agreement. The Tenth Circuit's trap for the unwary would persist.

C. The Date-Of-Resignation Rule Promotes Conciliation.

As this Court has recognized, "[v]oluntary compliance with Title VII . . . is an important public policy. Congress intended cooperation and conciliation to be the preferred means of enforcing Title VII." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983). To this end, the Court has

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[10] http://www.eeoc.gov/employees/afterfiling.cfm (last visited July 2, 2015).

looked to whether an action would "effect Congress' intention to promote conciliation rather than litigation in the Title VII context." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). Starting the filing period at resignation encourages cooperative efforts between employers and employees without allowing inappropriate delay.

1. The date-of-resignation rule permits employees to make good-faith efforts to continue employment and resolve concerns with their employers. Where employment relationships have begun to deteriorate, this rule encourages employees to stay on the job and try to work things out informally, thus promoting workplace stability.

The court of appeals' rule, by contrast, would encourage employees to quit soon after perceived discriminatory acts to avoid a time bar, rather than make good-faith efforts to resolve matters internally. As the EEOC has observed, "[s]uch an approach to timeliness encourages the filing of unnecessary charges, forcing the employee to act while he is deliberating an option that may well render the filing of any charge moot." Br. of the EEOC as Amicus Curiae in Support of the Appellant at *13, *Bailey v. United Airlines, Inc.*, 279 F3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245.

Furthermore, the Tenth Circuit's rule would hinder conciliation even for employees attempting to stay at their jobs despite working conditions that a reasonable person could find intolerable. As this Court noted in *Mac's Shell Service, Inc. v. Shell Oil Products Co.*, "'sunk costs, optimism, and the habit of years might lead franchisees to try to make the new

arrangements work, even when the terms have changed so materially as to make success impossible.' But surely these same factors compel employees and tenants – no less than service-station franchisees – to try to make their changed arrangements work." 559 U.S. 175, 185 (2010) (citation omitted).

Moreover, filing a complaint while on the job may strain relationships with an employer and exacerbate already onerous working conditions. This result is all the more likely when (as here) the employee has already experienced discriminatory retaliation. An employer who has previously responded to an employee's discrimination claim by taking adverse actions against that employee is likely to respond to subsequent complaints with further retaliation. This could make conciliation efforts impossible even if an employee made good-faith efforts to stay at her current job.

If distorted incentives were not enough, employees face a catch-22 under the last-discriminatory-act rule. If employees delay filing their claims, they risk running out the limitations period. But employees who quit immediately risk forfeiting their claims, because courts "generally require that the employee must give higher levels of management the opportunity to correct an adverse situation before quitting and claiming constructive discharge." *See* Lindemann, *supra*, at 21-44.

2. Contrary to the Tenth Circuit's suggestion, the date-of-resignation rule would not encourage employees "to extend the date of accrual indefinitely." Pet. App. 20a.

Unlike other claims, where there may be financial incentives to delay a suit, *see Petrella v. MGM, Inc.*, 134 S. Ct. 1962, 1976 (2014), an employee does not benefit from waiting to bring a constructive discharge claim. A claim for back pay under Title VII does not increase in value if a suit is delayed because no back pay accumulates when a person is still employed and receiving a paycheck.

Furthermore, employees who delay filing constructive discharge claims will have difficulty proving "working conditions so intolerable that a reasonable person would have felt compelled to resign." *Suders*, 542 U.S. at 147. Courts have recognized that the "freshness of the instances of harassment" will affect whether an employee's resignation was really a constructive discharge. *See, e.g.*, *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1110 n.2 (9th Cir. 1998). Put another way, the longer an employee delays her resignation, "the more difficult it may be to prove that the allegedly intolerable conditions of employment actually were intolerable on an objective basis, or that it was these conditions that caused the employee's resignation." *Mullins v. Rockwell Int'l Corp.*, 936 P.2d 1246, 1251 (Cal. 1997) (internal citation omitted) (adopting date-of-resignation rule for constructive wrongful discharge).

3. A last-act rule also would enable employers to lull unwary employees into letting their claims lapse. A federal employer could offer an employee a resignation option and give the employee more than 45 days to consider retiring, thereby insulating itself from a constructive discharge claim. In that situation, the clock would begin to run when the

employer imposed the choice, but an unwary employee would not know to file a constructive discharge complaint before deciding that resignation was the lesser of two evils. This would subvert Title VII's anti-discrimination purpose and allow employers to "accomplish indirectly what the law prohibits being done directly." Lindemann, *supra*, at 21-33.

Thus, under the last-act rule, some claimants like Mr. Green would find that the 45-day period to bring their claims came and went while they were considering whether to stick it out or resign. That rule – which punishes employees for trying to make reasoned decisions about their professional futures – undermines the purposes of Title VII, which seeks both to root out discrimination and to promote employer-employee harmony.

CONCLUSION

The judgment of the court of appeals should be reversed.

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July 6, 2015

No. 14-613

In the Supreme Court of the United States

MARVIN GREEN, PETITIONER

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Whether, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the filing period for a constructive-discharge claim begins to run when an employee resigns or at the time of the employer's last discriminatory act giving rise to the resignation.

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Black's Law Dictionary (10th ed. 2014) 24
3 Lex K. Larson, *Labor and Employment Law* (2015) 31
1 Barbara T. Lindemann et al., *Employment Discrimination Law* (5th ed. 2012) 19, 28
United States Amicus Br., *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53 (2006) (No. 05-259) 37
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 760 F.3d 1135. The opinion of the district court (Pet. App. 28a-50a) is not published in the *Federal Supplement* but is available at 2013 WL 424777.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2014. On October 6, 2014, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 26, 2014. The petition was filed on November 25, 2014. The petition was granted on April 27, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in the appendix to this brief.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits various discriminatory employment practices by both private and public employers. By its terms, the principal federal-sector provision of Title VII requires "[a]ll personnel actions affecting employees" of various federal entities including, as relevant here, the United States Postal Service to be "made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e–16(a). In the private sector, Congress has expressly made it an "unlawful employment practice" for an employer to discriminate against employees or applicants who oppose practices that Title VII makes unlawful, or who participate in proceedings, investigations, or hearings involving charges of discrimination. 42 U.S.C. 2000e–3(a). Although that anti-retaliation provision has not been directly incorporated into the federal-sector provisions, courts have generally construed Title VII as extending the private-sector ban on retaliation to the federal government. See, *e.g.*, *Taylor* v. *Solis*, 571 F.3d 1313, 1320 (D.C. Cir. 2009); cf. *Gómez-Pérez* v. *Potter*, 553 U.S. 474, 488 n.4 (2008) (reserving the question).

Before filing a suit in district court alleging a Title VII violation, a federal-agency employee is required to exhaust administrative remedies. 42 U.S.C. 2000e–16(c). A regulation specifies that, to invoke the administrative process, the employee "must initiate contact" with an equal employment opportunity (EEO) counse-

lor at his or her agency "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1).[1]

2. Petitioner is an African-American man who was employed by the United States Postal Service from 1973 until 2010. Pet. App. 3a, 28a-29a. Beginning in 2002, he served as the postmaster in Englewood, Colorado. *Id.* at 3a, 29a. In 2008, he applied for a more senior postmaster position in Boulder, Colorado, but he was not selected for that higher-paying job. *Ibid.* He then filed a formal complaint with the agency's EEO office, alleging discrimination on the basis of race. *Ibid.* Petitioner and the agency settled that matter, but in May and July 2009, petitioner filed informal EEO complaints alleging that he had been retaliated against because of his EEO activity. *Ibid.* After an investigation, the Postal Service informed petitioner that he could file a formal retaliation complaint, but he did not do so. *Id.* at 3a-4a, 30a.

In November 2009, the Postal Service directed petitioner to appear for an investigative interview to discuss allegations that he had not complied with agency procedures when processing subordinate employees' grievances, which had resulted in adverse decisions requiring the Postal Service to pay damages and penalties. Pet. App. 4a, 30a. Petitioner, accompanied by a

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[1] Private-sector and non-federal public employees are similarly required to file a timely charge with the EEOC before filing a Title VII suit in district court, although they are allowed more time than federal employees—either 180 or 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e–5(e)(1), 2000e–16c(b)(1); see *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 623-624 (2007).

representative from the National Association of Postmasters, Robert Podio, appeared at the interview on December 11, 2009, which was conducted by David Knight, the human-resources manager for the Postal Service's Colorado/Wyoming district, and Charmaine Ehrenshaft, the district's manager of labor relations. *Ibid.* Petitioner was asked, *inter alia*, about allegations that he had intentionally delayed the mail by failing to timely sign and return receipts for certified letters relating to the grievances. *Id.* at 4a, 31a. After that interview, petitioner met with two agents from the Postal Service's Office of Inspector General, which had, as a result of a congressional inquiry, begun an investigation of potentially criminal allegations that petitioner had intentionally delayed the mail. *Id.* at 4a-5a, 31a; J.A. 32. Immediately after petitioner's meeting with the agents, Knight and Ehrenshaft gave petitioner a letter informing him that, under the agency's emergency-placement policy, he was being removed from duty because he had disrupted "day-to-day postal operations." Pet. App. 5a, 31a. The letter further stated that he would be returned to duty "when the cause for nonpay status ceases." *Id.* at 5a.

The next day, petitioner's representative, Podio, initiated negotiations with Knight to resolve the issues that had been raised in the interview. Pet. App. 5a, 32a. Podio asked Knight whether he would end his investigation "[i]f I can get [petitioner] to retire." J.A. 54. Knight responded favorably, stating "[i]f he retires I will not charge him." *Ibid.* Podio said he would "start to work toward" an agreement under which petitioner would "sign retirement paperwork," remain on paid leave for the interim, and not be able to "revoke" the retirement. *Ibid.*

On December 16, 2009, the settlement negotiations concluded. Pet. App. 5a, 32a. In an agreement signed that day by petitioner, Podio, and Knight, the Postal Service agreed that it would not pursue any charges against petitioner based on the issues discussed during the December 11, 2009 interviews. J.A. 60-61. In return, petitioner agreed that he would "immediately relinquish" his level-22 position as the postmaster in Englewood and accept a demotion to a lower-paying level-13 postmaster position in Wyoming. J.A. 60. (Removing petitioner from the Englewood position was necessary to allow someone else to fill that important slot immediately. J.A. 51.) The agreement also provided that petitioner would receive "saved salary" (*i.e.*, the higher rate of pay associated with his former position) until March 30, 2010, and that he would be allowed to use annual leave and then sick leave during the period running from December 14, 2009, until March 31, 2010. J.A. 60. Finally, the agreement provided as follows:

> Mr. Green agrees to retire from the Postal Service no later than March 31, 2010. Mr. Green agrees to take all necessary steps to effect his retirement on or before March 31, 2010. If retirement from the Postal Service does not occur Mr. Green will report for duty in Wamsutter, Wyoming on April 1, 2010 and the saved salary shall immediately cease.

J.A. 60-61.

As contemplated by the agreement, petitioner began using annual leave and sick leave (at full pay based on his prior position), and on February 9, 2010, petitioner submitted papers requesting that his retirement be made effective on March 31, 2010. Pet. App. 5a-6a.

Meanwhile, on January 7, 2010, petitioner had met with an EEO counselor and filed an informal complaint alleging that the Postal Service had retaliated against him for his earlier EEO activities when it removed him from his Englewood position and issued the emergency-placement letter. Pet. App. 6a. On February 5, 2010, the EEO counselor notified petitioner (and his retained counsel) that he could file a formal complaint of retaliation on the basis of the removal and emergency placement, C.A. App. 59-61, and petitioner filed such a complaint on February 17, 2010, Pet. App. 6a. The agency EEO office ultimately dismissed petitioner's complaint as precluded by the December 16, 2009 settlement agreement, and the Office of Federal Operations at the Equal Employment Opportunity Commission (EEOC) upheld that dismissal. *Ibid.*

On March 22, 2010, however, petitioner contacted an EEO counselor and filed another informal complaint, this time alleging that he had been constructively discharged in retaliation for his earlier EEO activities. Pet. App. 6a, 32a; J.A. 64-67. Petitioner filed a formal complaint making that allegation on April 26, 2010. Pet. App. 32a; J.A. 22. The agency EEO office dismissed petitioner's complaint "for failure to state a claim, for constituting a collateral attack on a settlement agreement, and for stating the same claim" that had already been decided by the agency and the EEOC. J.A. 25.[2]

3. On September 8, 2010, petitioner filed this suit in district court. Pet. App. 7a, 32a. In his amended complaint, petitioner alleges five acts of retaliation in vio-

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[2] The EEO office also determined that, even assuming it could consider petitioner's retaliatory-constructive-discharge claim, the claim would fail on the merits. J.A. 25-44.

lation of Title VII on account of his prior EEO activity, including his constructive discharge by forced retirement. *Id.* at 7a, 32a-33a; J.A. 8-20. The district court granted the Postal Service's motion to dismiss three claims that are no longer at issue. Pet. App. 33a.

After discovery, the district court granted summary judgment to the Postal Service on petitioner's remaining two retaliation claims, including, as relevant here, the claim for constructive discharge. Pet. App. 33a-50a. The court held that the constructive-discharge claim could not have accrued any later than December 16, 2009, the date of the settlement agreement. *Id.* at 37a-40a. The court noted that petitioner does not allege that the Postal Service engaged in any retaliatory acts after that date, and that the agency actions that petitioner alleges forced him to retire culminated in the signing of the agreement. *Id.* at 37a-38a.

The district court acknowledged precedent cited by petitioner holding that a constructive-discharge claim accrues when the employee provides "definitive notice of her intent to retire." Pet. App. 38a. But the court concluded that, even under that standard, petitioner's claim would fail because he "notified the Postal Service on December 16, 2009, that he was retiring by signing the settlement agreement that day." *Id.* at 39a. Because that was more than 45 days before his March 22 contact with the EEO counselor, petitioner had "failed to properly exhaust" the claim. *Id.* at 38a, 39a.[3]

4. The court of appeals affirmed in relevant part and reversed in part. Pet. App. 1a-27a.

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[3] The district court also granted summary judgment to the Postal Service on petitioner's emergency-placement claim on the ground that the placement was not a materially adverse action. Pet. App. 40a-48a.

The court of appeals affirmed the district court's grant of summary judgment to the Postal Service on petitioner's constructive-discharge claim. Pet. App. 15a-23a. The court concluded that petitioner's claim was untimely because all of the allegedly discriminatory or retaliatory acts occurred on or before December 16, 2009, and he did not initiate his administrative complaint within 45 days of that date. *Id.* at 16a.

After discussing the genesis and history of constructive-discharge claims, the court of appeals noted that those claims "'involve[] *both* an employee's decision to leave and [the employer's] precipitating conduct,'" thus creating "interesting issues regarding when such a claim accrues, and hence when a claim is untimely." Pet. App. 18a (quoting and adding emphasis and bracketed language to *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 148 (2004)). As the court of appeals observed, in the context of a constructive discharge, "quitting is an element of the claim," and "generally a claim does not accrue before all its elements can be satisfied." *Ibid.* That aspect of a constructive-discharge claim, the court of appeals acknowledged, counsels in favor of having the statute of limitations run from the date on which "the employee quits or announces his future departure." *Ibid.*

The court of appeals likewise acknowledged that, although "[f]ew court opinions have discussed the issue, either under Title VII or in other contexts," most of them have "said that the constructive-discharge claim accrued when the employee gave notice of departure." Pet. App. 18a.

The court of appeals, however, concluded that it could not "endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminato-

ry act' of the employer" for purposes of the limitations period defined in 29 C.F.R. 1614.105(a)(1). Pet. App. 20a. Relying on *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), the court explained that "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." Pet. App. 20a (quoting and omitting brackets from *Ricks*, 449 U.S. at 258). The court expressed "particular concern" that "delaying accrual past the date of the last discriminatory act and setting it at the date of notice of resignation would run counter to an essential feature of limitations periods by allowing the employee to extend the date of accrual indefinitely." *Id.* at 20a-21a. Accordingly, the court "agree[d] with the courts that have required some discriminatory act by the employer within the limitations period." *Id.* at 22a.

The court of appeals thus concluded that petitioner had not timely exhausted his constructive-discharge claim because he "does not claim that the Postal Service did anything more to him" after he signed the settlement agreement on December 16, 2009, and he did not initiate EEO counseling on his constructive-discharge claim until March 22, 2010, "well beyond 45 days later." Pet. App. 23a.[4]

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[4] The court of appeals reversed the grant of summary judgment on petitioner's emergency-placement claim. Pet. App. 23a-26a. In the court's view, petitioner could establish that his placement on emergency off-duty status was a materially adverse action because, when he received notice of that action, he did not know that he would ultimately be paid. *Id.* at 25a. Because it was "unclear," however, whether petitioner could "establish the other elements of his emergency-placement claim," the court remanded to the district court for further proceedings. *Id.* at 26a.

5. In this Court, the government's brief opposing the petition for a writ of certiorari did not express a position about the correctness of the rationale of the court of appeals' decision, see Br. in Opp. 8-15; Cert. Reply Br. 1, but it did contend that "petitioner himself would not prevail under the accrual standard he advocates," Br. in Opp. 15. On June 30, 2015, a few days before petitioner filed his brief on the merits, the government informed the Court by letter that it would not defend the rationale of the court of appeals' decision but that it would continue to defend the court of appeals' judgment, and that, under the circumstances, the Court may wish to invite an amicus curiae to file a brief to defend the rationale of the court of appeals' decision.

SUMMARY OF ARGUMENT

When a Title VII retaliation claim depends on the presence of a constructive discharge, the period for initiating administrative consideration of that claim does not begin until the employee gives notice of his resignation.

A. As a federal-sector employee, petitioner was required by 29 C.F.R. 1614.105(a)(1) to initiate contact with an EEO counselor within 45 days in order to begin the process of exhausting his administrative remedies. The Court has treated Title VII's other timely-filing requirements, in both the private- and federal-sector contexts, as being like statutes of limitations, and the regulation's 45-day requirement warrants similar treatment. The Court has also explained that, barring a compelling textual justification to the contrary, a limitations period will commence only when a plaintiff has a complete and present cause of action on which he can file suit and obtain relief.

B. When this Court recognized that Title VII encompasses constructive-discharge liability, it explained that "[a] constructive discharge involves both an employee's decision to leave and [the employer's] precipitating conduct." *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 148 (2004). In other words, the discharge does not occur—and the cause of action is not present—until the employee decides to leave. As a result, under the general rule, the employer's precipitating conduct is, taken alone, not enough to initiate the period for raising a claim that depends upon the existence of a constructive discharge. Instead, as petitioner recognizes, that period begins when the employee gives notice to the employer of his decision to leave (or, in the absence of advance notice, resigns).

C. The court of appeals recognized that its holding was a departure from the general rule but felt obliged to focus on the employer's own actions and expressed concern about allowing the employee, by dictating the time of resignation, to extend the accrual date. Such considerations are of diminished significance in the constructive-discharge context for several reasons.

First, applying the notice-of-resignation rule does not permit an employee to delay suit on his actual injury because, in the specific context of a constructive-discharge claim, the relevant species of harm (*i.e.*, the resignation that is allegedly a constructive discharge) does not occur until there is a decision to resign.

Second, the notice-of-resignation rule does not truly place the limitations period in the plaintiff's hands, because the decision to resign is not entirely his own. Instead, the resignation is considered a *constructive* discharge precisely because it is legally imputed to the employer (the only one with the power of discharge).

Third, the constructive-discharge context is distinguishable from the denial-of-tenure challenge in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), in which the Court emphasized that "the proper focus is upon the time of the *discriminatory acts*" rather than when "the *consequences* of the acts became most painful." *Id.* at 258 (brackets and citation omitted). In the constructive-discharge context, unlike in *Ricks*, the relevant consequence (resignation) is not "a delayed, but inevitable, consequence" of the challenged conduct, *id.* at 257-258, but rather a new, intervening act which is imputed to the employer.

Fourth, as a practical matter, an employee has no unilateral power to determine when the limitations period begins, because constructive-discharge doctrine requires him to establish that the employer created (or permitted) circumstances under which "a reasonable person in the employee's position would have felt *compelled* to resign." *Suders*, 542 U.S. at 141 (emphasis added). An employee alleging a constructive discharge thus cannot wait too long, because the necessary allegation that the employer's actions created "unendurable working conditions" (*ibid.*) grows less plausible the longer he endures them.

D. Additional policy considerations counsel against the court of appeals' departure from the usual limitations rule. The court suggested that an employee should simply file one challenge to the employer's precipitating conduct and, in the event of a later resignation, amend the charge to include a constructive-discharge allegation. Even if such an amendment were possible, that procedure would complicate a process intended to be navigated by lay complainants, result in the multiplication of claims, and offer little comfort to

employees whose resignation decisions came too long after the precipitating conduct. Finally, it bears noting that the basic premises of the notice-of-resignation rule in the constructive-discharge context have long been recognized by several courts of appeals, as well as by the EEOC, and (in the context of constructive-discharge claims under other statutes) by the Department of Labor's Administrative Review Board.

E. Although the court of appeals erred in rejecting the notice-of-resignation rule, its judgment should be affirmed, because petitioner's March 22, 2010 contact with an EEO counselor came more than 45 days after his notice of resignation. As the district court held, petitioner gave his notice of resignation on December 16, 2009, when he signed an agreement stating that he "*agrees to retire* from the Postal Service no later than March 31, 2010" and that he "*agrees to take all necessary steps to effect his retirement* on or before March 31, 2010." J.A. 60-61 (emphases added). Although the court of appeals did not address the district court's construction of the agreement, if this Court adopts the notice-of-resignation rule, it should apply that standard to the facts of the case as determined by the district court when it construed the plain meaning of the relevant provision of the December 16 agreement.

Finally, both parties and both courts below have proceeded on the premise that the timeliness question in this case is governed by the first clause of the regulation governing federal-sector Title VII claims, which requires a plaintiff to make contact with a counselor "within 45 days of the date of the matter alleged to be discriminatory," rather than by the second clause of that regulation, which requires a plaintiff to act, "in the case of a personnel action, within 45 days of the

effective date of the action." 29 C.F.R. 1614.105(a)(1). The Court should decide the case on that same assumption (which would also effectively allow the Court to speak to the non-federal-sector rule). Although that premise—on which petitioner still affirmatively relies—is not obviously correct, departing from it now would raise several other issues that have not been briefed by the parties or addressed by the courts below, and on which the case law is unsettled.

ARGUMENT

WHEN A TITLE VII RETALIATION CLAIM DEPENDS ON THE PRESENCE OF A CONSTRUCTIVE DISCHARGE, THE PERIOD FOR INITIATING ADMINISTRATIVE CONSIDERATION OF THAT CLAIM DOES NOT BEGIN UNTIL THE EMPLOYEE GIVES NOTICE OF RESIGNATION

When evaluating the timeliness of initiating administrative consideration of a Title VII claim, this Court has repeatedly emphasized the importance of "identifying precisely the unlawful employment practice of which [the plaintiff] complains." *Lewis* v. *City of Chicago*, 560 U.S. 205, 211 (2010) (citation, internal quotation marks, and brackets omitted); see *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 (2007) ("[W]e have stressed the need to identify with care the specific employment practice that is at issue."). Here, petitioner alleges that he was constructively discharged in retaliation for his prior EEO activities. Because there could not have been any constructive discharge until he gave notice of his resignation, the 45-day period under 29 C.F.R. 1614.105(a)(1) for initiating contact with an EEO counselor about a constructive-discharge claim did not begin to run until he gave that notice. The court of appeals accordingly erred in holding that the period ran from the employer's "last

discriminatory act." Pet. App. 20a. Nevertheless, its decision should be affirmed because petitioner gave his notice of resignation on December 16, 2009, when he signed an agreement containing his express promise to retire and to submit his retirement papers, J.A. 60-61, and he indisputably failed to initiate contact within 45 days of that notice, see Pet. Br. 14.

A. Limitations Periods Generally Begin To Run Only When The Plaintiff Has A Complete And Present Cause Of Action

The question before the Court is whether petitioner was timely in satisfying the requirement that he exhaust his administrative remedies before filing this Title VII suit in district court. 42 U.S.C. 2000e–16(c). His exhaustion efforts were timely only if he "initiate[d] contact" with an EEO counselor at the Postal Service "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1).[5]

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[5] As he has at previous points in this case, petitioner contends that the applicable portion of the regulation is the reference in its first clause to the period "within 45 days of the date of the matter alleged to be discriminatory"; petitioner does not invoke the regulation's second clause, which would require contact "within 45 days of the effective date of [a personnel] action." See Pet. Br. 17-18; see also Pet. App. 20a n.3 (court of appeals' observation that petitioner "has not suggested that his notice of resignation was a personnel action under the regulation"). That second clause has no analogue in cases brought against private employers and state and local-government employers, where a discrete act "must be challenged within 180 [or] 300 days of the date that the charging party received unequivocal written or oral notification of the action, regardless of the action's effective date." EEOC Compliance Manual, *Threshold Issues* § 2-IV C.1.a, www.eeoc.gov/policy/docs/

1. Whether or not that regulation governing the timeliness of an administrative proceeding is, considered strictly, a statute of limitations, this Court has repeatedly drawn upon statute-of-limitations principles when construing closely related provisions of Title VII. In *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the Court held that the requirement in 42 U.S.C. 2000e–5(e) to file a timely charge of discrimination with the EEOC against a private employer, "like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 455 U.S. at 393; see *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 123 (2002) (O'Connor, J., concurring in part and dissenting in part) ("The Court today holds that, for discrete discriminatory acts, § 2000e–5(e)(1) serves as a form of statute of limitations."). The Court later noted that *Zipes* "foreclosed" an employer's contention that there were no equitable exceptions to the deadline under 42 U.S.C. 2000e–5(f)(1) for filing a district-court suit against a private employer. *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 349 n.3 (1983). And it again relied on *Zipes* when holding that the deadline under 42 U.S.C. 2000e–16(c) for filing a district-court suit against a federal employer is similarly subject to equitable tolling. See *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 & n.2 (1990).

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threshold.html (last visited July 27, 2015); see 42 U.S.C. 2000e–5(e)(1) (requiring charge to be filed within 180 or 300 days "after the alleged unlawful employment practice occurred"). Because the government has not previously contended otherwise, the bulk of the following discussion shares petitioner's premise that the first clause governs. That premise, however, is not obviously correct. See pp. 37-38, *infra*.

Section 1614.105(a)(1) is subject to equitable exceptions,[6] and the courts of appeals have therefore applied similar reasoning in concluding that a failure to satisfy its 45-day deadline "equates to the violation of a statute of limitations." *Smith* v. *Potter*, 445 F.3d 1000, 1007 (7th Cir. 2006); see, *e.g.*, *Fitzgerald* v. *Henderson*, 251 F.3d 345, 359 (2d Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Bowden* v. *United States*, 106 F.3d 433, 437 (D.C. Cir. 1997). In that light, the deadline requires the "diligent prosecution of known claims," but it does not operate as an absolute bar to liability without regard to the timing of "the accrual of any cause of action" or of the occurrence or discovery of injury. *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182, 2183 (2014) (citations and internal quotation marks omitted).

2. In applying statutes of limitations, the Court has "repeatedly recognized * * * the standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Graham County Soil & Water Conservation Dist.* v. *United States*, 545 U.S. 409, 418 (2005) (citation and internal quotation marks omitted). That moment occurs when "the plaintiff can file suit and obtain relief." *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997). Although the Court has recognized that "it is theoretically pos-

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[6] The agency and the EEOC are affirmatively authorized to extend the 45-day period if the employee shows, for instance, that he was unaware of the time limits, that he "did not know and reasonably should not have * * * known that the discriminatory matter or personnel action occurred," or that other "reasons considered sufficient" support an extension. 29 C.F.R. 1614.105(a)(2); see 29 C.F.R. 1614.604(c) (making all time limits in Part 1614 "subject to waiver, estoppel and equitable tolling").

sible" for a statute of limitations to begin running (and perhaps even to expire) before suit can be filed on the associated cause of action, *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993), the Court has rarely countenanced such a result and has done so only where the plain text of a statute or the parties' contract compelled a departure from the general rule.[7]

B. A Claim Alleging A Constructive Discharge Does Not Accrue Until An Employee Gives Notice Of Resignation (Or, In The Absence Of Advance Notice, Resigns)

Here, petitioner challenged a series of five allegedly retaliatory acts attributable to the Postal Service, see Pet. App. 7a, but the only claim currently at issue is that he was constructively discharged. Thus, for purposes of applying the "standard rule" governing the limitations period, the question is when petitioner had "a complete and present cause of action" turning on

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[7] See, *e.g.*, *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 615 (2013) (holding that the plain terms of an ERISA plan could bind the parties to a limitations period that would usually provide a participant at least one year to file suit after internal review of a disability-benefits claim; acknowledging that this rule would in "rare cases" allow less time, and perhaps no time, to file suit, but would probably have that effect only for participants who had "not diligently pursued their rights"); *Dodd* v. *United States*, 545 U.S. 353, 358 (2005) (holding that, under "the only natural reading of the [statutory] text," one period for seeking collateral review of a conviction under 28 U.S.C. 2255 ran from the date this Court recognized a right, even if it had not made that right retroactively applicable to cases on collateral review, a result that would altogether preclude many second or successive applications for relief).

that constructive discharge. *Graham County*, 545 U.S. at 418.[8]

1. In 2004, the Court held "that Title VII encompasses employer liability for a constructive discharge." *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 143. The Court explained that, "[u]nder the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes." *Id.* at 141. It further recognized that "[a] constructive discharge involves both an employee's decision to leave and precipitating conduct," and whether the precipitating conduct can be attributed to the employer may require, in part, a determination that it "involve[s] official action," such as "a demotion or a reduction in compensation." *Id.* at 148.

In light of *Suders*'s observation that a constructive discharge involves both "precipitating conduct" *and* "an employee's decision to leave," the decision below correctly recognized that a charge alleging a constructive discharge cannot exist "before the employee quits his job" or "announces his future departure." Pet. App. 18a, 22a. That is consistent with hornbook law in the Title VII context. See 1 Barbara T. Lindemann et al., *Employment Discrimination Law* 21-46 (5th ed. 2012) ("An employee claiming constructive discharge must actually leave employment."); 2 EEOC Compli-

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[8] We assume for current purposes that petitioner would be able to establish that there was indeed a constructive discharge. See *Lewis*, 560 U.S. at 212 (observing that whether plaintiffs "adequately proved" an action had a disparate impact was not before the Court; "[w]hat matters [for purposes of determining timeliness] is that their allegations, based on the City's actual implementation of its policy, stated a cognizable [disparate-impact] claim").

ance Manual (BNA) § 612.9(a), at 612:0006 (2008) ("A constructive discharge occurs when an employee resigns from his/her employment because (s)he is being subjected to unlawful employment practices."). Indeed, this Court recently said as much. When determining what could constitute a "constructive termination" of a petroleum franchise for purposes of the Petroleum Marketing Practices Act, 15 U.S.C. 2801 *et seq.*, the Court analogized such a constructive-termination claim to one for "constructive discharge in the field of employment law" and explained that "[t]o recover for constructive discharge * * * an employee generally is required to quit his or her job." *Mac's Shell Serv., Inc.* v. *Shell Oil Prods. Co.*, 559 U.S. 175, 184 (2010).

2. As petitioner explains (Br. 17), because the cause of action does not become complete until the employee decides to resign, "the general [limitations] rule dictates that the filing period for constructive discharge should run from the date of resignation, barring an unambiguous textual provision to the contrary." There is no suggestion that the text of the statute or regulation prescribes otherwise.

Although petitioner repeatedly characterizes that result as the "date-of-resignation rule," *e.g.*, Br. 11, 12, 13, 18, 24, 26, 28, 31, 32, he further correctly explains that "the date of resignation will be when the employee gives notice or simply leaves the workplace," Br. 32. If an employee gives definitive notice that he is resigning and the resignation will take effect weeks or months later, the clock begins running on the earlier date on which notice is given, not on his last day of work. See *Flaherty* v. *Metromail Corp.*, 235 F.3d 133, 138-139 (2d Cir. 2000). Petitioner himself contends that he gave

notice on February 9 that he would be resigning effective on March 31, and he counts from February 9 rather than March 31. See Pet. Br. 14. Using the date of notice of resignation when it is earlier than the actual date of separation is consistent with the federal cases on which petitioner relies (Br. 31 n.8)[9] as well as with most of the state-court decisions about non-Title VII constructive discharges on which he relies (Br. 23 n.6).[10] Using the earlier notice-of-resignation date is

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[9] See *Flaherty*, 235 F.3d at 138-139 (using date employee gave notice of resignation, not later date on which resignation became effective); *Draper* v. *Coeur Rochester, Inc.*, 147 F.3d 1104, 1106, 1111 (9th Cir. 1998) (using date on which employee quit, which was the same as her last day); *American Airlines, Inc.* v. *Cardoza-Rodriguez*, 133 F.3d 111, 114, 123 (1st Cir. 1998) (using dates employees gave notice they were accepting early retirement, not their subsequent termination dates); *Hukkanen* v. *International Union of Operating Eng'rs*, 3 F.3d 281, 284, 285 (8th Cir. 1993) (using date on which employee "resigned her job," which was apparently the same date that notice was given); *Young* v. *National Ctr. for Health Servs. Research*, 828 F.2d 235, 237-239 (4th Cir. 1987) (using date of employee's resignation, which was apparently the same date that notice was given); see also Pet. 12 (relying on *Flaherty*, which "made clear that the date of notice—and not the employee's last day at work several months later * * * —started the filing period").

[10] See *Hancock* v. *Bureau of Nat'l Affairs, Inc.*, 645 A.2d 588, 590 (D.C. 1994) (using date of notice of resignation, not later effective date); *Patterson* v. *State Dep't of Health & Welfare*, 256 P.3d 718, 725 (Idaho 2011) (same); *Whye* v. *City Council*, 102 P.3d 384, 385, 387 (Kan. 2004) (same); *Jeffery* v. *City of Nashua*, 48 A.3d 931, 934, 936 (N.H. 2012) (same); but see *Stupek* v. *Wyle Labs. Corp.*, 963 P.2d 678, 680-682 (Or. 1998) (using effective date of termination, not earlier dates on which employee gave notice of resignation and signed notice of termination). Two other cases petitioner invokes are equivocal. See *Mullins* v. *Rockwell Int'l Corp.*, 936 P 2d 1246, 1247, 1248, 1252-1253 (Cal. 1997) (using "actual termination" date,

also necessary to ensure, as petitioner proposes, that the "date-of-resignation analysis mirrors the easily administered date-of-termination rule" (Pet. Br. 31) that applies when there is an actual, rather than constructive, termination. See generally EEOC Compliance Manual, *Threshold Issues* § 2-IV C.1.a, www.eeoc.gov/policy/docs/threshold.html (last visited July 27, 2015) (noting that, for cases involving private employers, the time for challenging "[a] discrete act, such as * * * termination," runs from "the date that the charging party received unequivocal written or oral notification of the action, regardless of the action's effective date").

In short, before the "employee's decision to leave," *Suders*, 542 U.S. at 148, there is no constructive discharge. Any prior conduct of the employer—conduct that *might* precipitate a decision to resign—may be actionable in its own right, and limitations periods associated with claims arising from such prior acts will already have been triggered. See *Morgan*, 536 U.S. at 113 ("Each discrete discriminatory act starts a new clock for filing charges alleging that act."). But a claim that depends on the presence of a constructive dis-

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rather than date of employer's last precipitating act, but not specifying whether the trigger date was when employee submitted his resignation on September 20, 1989, or the "unspecified date in October 1989" when he "actually retired"; claims would have been timely under either date); *Douchette* v. *Bethel Sch. Dist. No. 403*, 818 P.2d 1362, 1367 & n.9 (Wash. 1991) (for wrongful-discharge claim, using date employee submitted her letter of resignation rather than its later effective date, when employee did not work after she submitted the letter; observing that "in a claim for constructive discharge, the date may be the date the employee gives notice to the employer or the last day of actual employment," but declining to "decide the date on which such a claim accrues").

charge will not be complete and present until the employee gives notice of his decision to leave. Thus, as the court of appeals recognized, the standard limitations rule supports postponing the trigger date for such claims "until the employee quits or announces his future departure." Pet. App. 18a.

C. The Court Of Appeals' Countervailing Concerns Are Of Diminished Significance In The Constructive-Discharge Context

Notwithstanding the conceded oddity of allowing the limitations period for a Title VII claim in the context of a constructive discharge to begin (and perhaps finish) running before that claim could even be brought, the court of appeals felt obliged to focus on the employer's own actions and expressed "particular concern" that allowing the limitations period to begin "at the date of notice of resignation would run counter to an essential feature of limitations periods by allowing the employee to extend the date of accrual indefinitely." Pet. App. 20a-21a. In the abstract, those concerns were legitimate. As a general matter, a

> tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. * * * Were it otherwise, the statute would begin to run only after a plaintiff became satisfied that he had been harmed enough, placing the supposed statute of repose in the sole hands of the party seeking relief.

Wallace v. *Kato*, 549 U.S. 384, 391 (2007) (citations and internal quotation marks omitted). Such considerations, however, are of limited applicability in this context.

1. Petitioner has not brought a generic claim of retaliation or discrimination, but a specific one that depends on his allegation that he suffered a discrete retaliatory act—a constructive discharge. Because he could not have alleged such a constructive discharge until he had actually given notice of his resignation, this is not an instance in which the employer's "wrongful act or omission" had already "result[ed] in damages" but petitioner waited to complain until he was "satisfied that he had been harmed enough," *Wallace*, 549 U.S. at 391. Instead, the relevant species of harm (*i.e.*, the resignation that is allegedly a constructive discharge) had not yet occurred.

2. Nor does it make sense to characterize a notice-of-resignation rule as placing the limitations period in "the sole hands of the party seeking relief." *Wallace*, 549 U.S. at 391. In the constructive-discharge context, the employee's act of resigning is not entirely in his own hands, but is instead legally imputed to the employer (the only one with the power of discharge). That is precisely why it is considered a *constructive* discharge: because the employee's act is, counterfactually, treated by the law as if it had been the employer's. See *Mac's Shell Serv.*, 559 U.S. at 185 ("[A] termination is deemed 'constructive' because it is the plaintiff, rather than the defendant, who formally puts an end to the [employment] relationship."). That aspect of the doctrine casts serious doubt on the court of appeals' reluctance to "endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer." Pet. App. 20a; see *Black's Law Dictionary* 380 (10th ed. 2014) (defining *constructive* as "[l]egally imputed; existing by virtue of legal fiction though not existing in fact").

3. The court of appeals grounded its reasoning in this Court's declaration that "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." Pet. App. 20a (quoting and omitting brackets and internal quotation marks from *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 258 (1980)). In *Ricks*, a faculty member alleged that discrimination had caused him to be denied tenure, which, in turn, meant that he was "offered a 'terminal' contract to teach one additional year," after which his employment at the college ended. 449 U.S. at 253, 254-255. He argued that the 180-day charge-filing period did not begin to run until his final termination, but the Court held that "the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks." *Id.* at 258. That was so "even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Ibid.* The Court added that, "[i]f Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment." *Id.* at 257.

There is, to be sure, a parallel between *Ricks* and this case; in both cases, the only discriminatory act that the employer directly committed occurred at one point in time, and the employee filed charges only after his employment was later terminated, without any further intervening acts of the employer. But there is also a salient difference. In *Ricks*, the Court's analysis turned on its understanding that the plaintiff's "termination of employment" at the school was "a

delayed, but inevitable, consequence of the denial of tenure." 449 U.S. at 257-258. Here, by contrast, it was not inevitable that the employer's conduct would precipitate a decision to resign until petitioner actually decided to resign. In the absence of that decision, there would have been no discharge. But if that decision to resign can, as discussed above, be legally imputed to the employer, then the constructive discharge can reasonably be deemed a discriminatory act of the employer. And once the act of resignation is imputed to the employer, there *is*—as in *Ricks* there was not—an intervening act of the employer.

The distinctive nature of constructive-discharge claims was foreshadowed by *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), which *Ricks* cited favorably, see 449 U.S. at 258. In *Evans*, the Court considered the potentially discriminatory effects of a seniority system that denied the plaintiff credit for her previous stint with the same company as a flight attendant, which had ended in February 1968 when she was about to be married and "was therefore forced to resign" under the company's "policy of refusing to allow its female flight attendants to be married." 431 U.S. at 554; see Pet. Br. at 4, *Evans*, *supra* (No. 76-333) (noting that the plaintiff "involuntarily resigned in anticipation of her marriage"). The Court focused on whether there was a "present *violation*" of Title VII in denying her seniority credit after she was rehired in 1972, and held that there was not. 431 U.S. at 558. But the Court's discussions of the plaintiff's failure to file a timely challenge to her forced resignation (or, in other words, her constructive discharge[11]) indicate that

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[11] See *Ledbetter*, 550 U.S. at 651 (Ginsburg, J., dissenting) (noting that *Evans* "involved * * * a constructive discharge").

the period for filing such a charge would have begun with her February 1968 separation—not at any previous point when it had already been made clear to her that the employer's longstanding policy would require her to separate if she became married. The Court noted that the plaintiff "did not initiate any proceedings of her own in 1968 by filing a charge with the EEOC *within 90 days of her separation*," *id.* at 554-555 (emphasis added), and that it was therefore "too late to obtain relief based on an unlawful employment practice *which occurred in 1968*," *id.* at 557 (emphasis added). In other words, the employer could have been held liable for the inevitable effects of its pre-1968 policy on the basis of the constructive discharge that did not happen until the plaintiff resigned in anticipation of her impending marriage, but the limitations period for such a claim did not start until the resulting resignation had occurred.

4. Constructive-discharge doctrine will not, however, permit an employee's resignation to be imputed to the employer unless the employee has satisfied a demanding standard. For a resignation to rise to the level of a constructive discharge, the employee will have to show that the employer created (or permitted) circumstances under which "a reasonable person in the employee's position would have felt *compelled* to resign" and will further have to establish that the resignation-precipitating conduct is attributable to "official" acts of the company (or else overcome an affirmative defense to confirm that vicarious liability is appropriate). *Suders*, 542 U.S. at 141, 148-149 (emphasis added). In such circumstances, the Court has agreed with the EEOC's observation that an employer "is responsible for a constructive discharge in the same manner

that it is responsible for the outright discriminatory discharge of a charging party." *Id.* at 142 (quoting 2 EEOC Compliance Manual § 612.9(a) (2002)). But the very conditions that make it reasonable to hold the employer "responsible" militate against the conclusion that the employee possesses an essentially unilateral power to determine when the limitations period begins.

Practical considerations associated with constructive-discharge-based claims also reduce the risk that an employee will foment uncertainty and create evidentiary problems for his employer by "extend[ing] the date of accrual indefinitely." Pet. App. 21a. Once an employer has taken a discrete act that may trigger a resignation (for instance, demoting or transferring an employee), the employee may need some time to confirm that his "fears" about an "intolerable job environment" will actually materialize. 1 Lindemann et al., *Employment Discrimination Law*, at 21-41. But remaining on the job for an extended period will likely make it more difficult to prove on the merits that the resignation should be deemed a constructive discharge. The employee will generally need to establish that the employer's actions created "unendurable working conditions," *Suders*, 542 U.S. at 141—a proposition that will grow less plausible the longer he endures them before announcing his resignation. See, *e.g.*, *Gerald* v. *University of P.R.*, 707 F.3d 7, 26 (1st Cir. 2013) ("If a plaintiff does not resign within a reasonable time period after the alleged harassment, he was not constructively discharged.") (citation omitted); *ibid.* (holding that eight-month delay after plaintiff's transfer made her resignation "too late * * * to be labeled a constructive discharge"; citing other deci-

sions holding that six- and seven-month delays were too long to support a constructive discharge); *Poland* v. *Chertoff*, 494 F.3d 1174, 1185 (9th Cir. 2007) (holding that cross-country transfer did not constitute constructive discharge in part because employee "worked in [the new job] for five months before deciding to retire" and then "worked the same job for three more months" before retiring). This self-limiting nature of the constructive-discharge calculus will thus prevent scenarios of the kind feared by the Court in *Ledbetter*, in which an employee "could file a timely EEOC charge today" on the basis of "a single discriminatory pay decision made 20 years ago." 550 U.S. at 639.

In any event, when the employee is given an affirmative choice between resigning and being subjected to materially changed terms or conditions of employment, the employer can add still another safeguard against delay by establishing a reasonable deadline by which the employee must make his choice. Yet, under the court of appeals' approach, the claim accrues when the employer presents such a choice, which means the employee could be time-barred even before his choice is made.

All in all, because "the specific employment practice that is at issue" (*Ledbetter*, 550 U.S. at 624) in this case is an alleged constructive discharge, the court of appeals' concerns about permitting the plaintiff to control the running of the statute of limitations by choosing whether and when to resign do not warrant a departure from the strong presumption that a limitations period begins only when the relevant "cause of action [is] fully formed and present," *id.* at 631 n.3.

D. Additional Policy Considerations Counsel Against The Court Of Appeals' Departure From the Usual Limitations Rule

Other policy considerations support calculating timeliness from the date the employee gives notice of resignation (or, in the absence of advance notice, the actual resignation date) rather than the date of the employer's last precipitating conduct.

1. In light of the unusual prospect that the limitations period would begin (and perhaps even end) before the critical event could even be alleged, the court of appeals suggested that an employee subjected to an employer's unfavorable action should challenge it in isolation; and if he "later decides he cannot take it any longer and therefore quits his job," he "likely" could "amend [the] timely charge to include an allegation of constructive discharge." Pet. App. 22a.

That proposed solution leaves much to be desired. Even assuming it were permissible, that approach would require the employee to multiply his claims, bringing one challenge to the precipitating conduct—essentially a lesser-included charge—simply to preserve the possibility of making a later constructive-discharge claim in light of what could otherwise be considered a separate discrete act (the resignation, if it occurs). And, as petitioner notes (Br. 34), depending on how much time passes between the original charge and the decision to resign, the court of appeals' approach could still render untimely an attempt to amend a charge to allege constructive discharge.

In any event, adding such complications to the exhaustion process would also be undesirable, since the Court has recognized that Title VII's initial procedural hurdles will often be navigated by "lay complainant[s]"

without the assistance of counsel. *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 115 (2002); see *Zipes*, 455 U.S. at 397.

2. Although there is frankly not much evidence that the question arises frequently—especially in the context of allegations that a discrete act (as opposed to a hostile work environment) precipitated a constructive discharge[12]—it bears noting that the basic premises of the notice-of-resignation rule in the constructive-discharge context have long been recognized by several courts of appeals,[13] as well as by the EEOC, see EEOC Amicus Br., *Bailey* v. *United Airlines, Inc.*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245, at *9-*11 (filed Mar. 26, 2001). In addition, the Department of Labor's Administrative Review

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[12] See 3 Lex K. Larson, *Labor and Employment Law* § 59.05[8], at 59-48 (2015) ("The most commonly alleged grounds for constructive discharge are that the employer has created, or allowed the creation of, an atmosphere of harassment or hostility which renders working conditions intolerable."). While petitioner notes (Br. 27) that the EEOC received more than 4000 charges alleging constructive discharge in violation of Title VII in 2014, that category accounted for only a small fraction of the 63,589 Title VII charges it received that year. See EEOC, *Title VII of the Civil Rights Act of 1964 Charges, FY 1997 – FY 2014*, www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (last visited July 27, 2015). Moreover, those statistics pertain to private-sector and state and local-government employees, for whom the limitations period is substantially longer (180 or 300 days), see note 1, *supra*, which would make any gap between the employer's own acts and the employee's resignation less likely to be dispositive.

[13] See note 9, *supra*; see also 3 Larson, *Labor and Employment Law* § 81.07[2][b], at 81-21 to 81-22 & n.30 ("In cases involving allegations of constructive discharge, the limitations period runs from the date the employee gives notice.") (citing 1998 and 2000 decisions, and noting contrary decision below in this case).

Board has used a similar approach when determining the timeliness of claims of retaliatory constructive discharges under other statutes—counting from the date that the employee gave notice of resignation, rather than from the earlier acts that triggered the resignation decision or the resignation's later effective date. See, *e.g.*, *Barrett* v. *e-Smart Techs., Inc.*, No. 11-088, 2013 WL 1874820, at *3-*4 (Admin. Rev. Bd. Apr. 25, 2013); *Peters* v. *American Eagle Airlines, Inc.*, No. 08-126, 2010 WL 3878524, at *3-*4 (Admin. Rev. Bd. Sept. 28, 2010).

Accordingly, we believe the Court should hold that the limitations period for a Title VII claim that is dependent on the existence of a constructive discharge should run from the date the employee gives notice of the resignation that is allegedly attributable to the employer rather than from the last allegedly discriminatory act that the employer directly committed.

E. In This Case The Limitations Period Was Triggered By Petitioner's December 16 Agreement To Retire By March 31

Although the court of appeals erred in concluding that the limitations period was triggered by the employer's last "discriminatory act" rather than the employee's notice of resignation, Pet. App. 22a, its judgment should nevertheless be affirmed, because, in this case, the employer's last act and the employee's notice of resignation both occurred on the same day.

1. As the district court held, if the employee's notice of resignation triggers the limitations period, petitioner gave that notice when he "notified the Postal Service on December 16, 2009, that he was retiring by signing the settlement agreement that day." Pet. App. 38a-39a.

Petitioner characterizes (Br. 7) the December 16 settlement agreement as permitting him to "choose one of two alternatives": retirement or relocation to a lower-paying job in Wyoming. But that is not what the agreement said. Rather, it expressly provided that petitioner "*agrees to retire* from the Postal Service no later than March 31, 2010" and that he "*agrees to take all necessary steps to effect his retirement* on or before March 31, 2010." J.A. 60-61 (emphases added).

Although the next sentence of the agreement stated that petitioner would be required to "report for duty" in Wyoming on April 1 "[i]f retirement from the Postal Service does not occur," J.A. 61, it did not thereby give him an option to revoke his agreement to retire. Nor did it purport to allow petitioner to decide at some later point whether he would in fact retire. Instead, that last sentence merely provided for contingencies in which retirement did not happen by that date (whether because petitioner reneged on his agreement, or because, through someone else's fault, the retirement had not yet become final).[14]

Even if that sentence of the agreement were seen as an implicit rescission clause, that would not alter the notice-of-resignation date, as shown by the most analogous case on which petitioner relies (Br. 31 n.8). In *American Airlines, Inc.* v. *Cardoza-Rodriguez*, 133

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[14] Any contract may, of course, be characterized as effectively creating an option between fulfilling it and being subject to suit for the damages associated with breaching it. But there is a clear difference between exercising an option actually provided in a contract and affirmatively breaching one's contractual obligations. See *Rousey* v. *Jacoway*, 544 U.S. 320, 328 (2005) ("[A] contracting party" does not have "an unrestricted right to breach a contract simply because the price of doing so is the payment of damages.").

F.3d 111 (1st Cir. 1998), the court held that "the latest" possible date for starting the limitations period was "when each employee accepted" an offer to participate in a voluntary early retirement program—even though the agreement at issue there provided for "a seven day rescission period after an election to participate." *Id.* at 114, 123. The court did not think it was necessary to wait for the rescission period to elapse before the employees had fully manifested their acceptance. That result makes good sense because, by definition, each employee had ultimately elected *not* to rescind, and should not have had an extra seven days to challenge his original, unchanged decision. Similarly, petitioner's failure to revoke his retirement agreement throughout the period from December 16 until March 31 should not extend the deadline for challenging his original, ultimately unchanged decision.

The district court thus correctly concluded that petitioner's agreement to retire occurred on the date when he signed the document declaring plainly that he "agree[d] to retire." J.A. 60.[15]

2. In light of its own holding, the court of appeals did not need to (and did not purport to) address the factual determination underlying the district court's alternative holding, though it did characterize the

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[15] In moving for summary judgment, the government relied on evidence that the human-resources manager who negotiated the agreement for the Postal Service understood "that [petitioner] would follow through on that agreement and therefore would not be reporting to the" lower-level position. J.A. 51; see Gov't Mot. for Summ. J. 20 (D. Ct. Doc. 90); see also J.A. 54 (petitioner's representative proposing settlement in which petitioner would agree to retire at future date and be unable to "revoke that date to retire"). In response, petitioner relied only on the text of the agreement. See Pet. Resp. to Mot. for Summ. J. 18 (D. Ct. Doc. 106).

settlement agreement as giving petitioner a choice about whether "to retire or to work in a position that paid much less." Pet. App. 2a; see *id.* at 5a.[16] As a result, this Court could decline to consider how its legal test would apply to the facts of this case and remand to allow the court of appeals to review the district court's alternative holding. But the Court has often elected to answer such questions itself. See, *e.g.*, *Lozman* v. *City of Riviera Beach*, 133 S. Ct. 735, 745-746 (2013) (applying newly declared legal standard to facts of case, despite government's suggestion of remand); *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721, 732-733 (2013) (same); *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2071-2072 (2011) (finding evidence sufficient to support jury verdict under "the correct standard," which had not been applied by the court of appeals). Indeed, it has followed such an approach in other Title VII cases. See *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 67, 70, 73 (2006) (rejecting standards applied in courts of appeals

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[16] In the court of appeals, petitioner continued to say that the agreement permitted him to decide at a later date whether to retire, Pet. C.A. Br. 49, but he did not clearly attack the alternative ground for the district court's untimeliness holding. Instead, he identified certain parts of the district court's discussion as being "disputed" facts, but he did not include in his list the sentence stating that he gave notification of his retirement by signing the agreement. See *id.* at 50. The government's brief explained that, "[b]y signing" the agreement, petitioner had "agreed to retire from the Postal Service by March 31, 2010." Gov't C.A. Br. 27. That brief also included several other characterizations suggesting, without citing anything other than the agreement, that he had agreed to retire "or accept [a] transfer," *id.* at 36, 44, 47, 50. Even so, petitioner then accused the government of "fail[ing] to acknowledge, as did the trial court, that [petitioner] had an option" under the agreement. Pet. C.A. Reply Br. 17.

to limit actionable retaliation under Title VII, but affirming judgment after applying Court's new "standard to the facts of th[e] case"); *Irwin*, 498 U.S. at 95-96 (finding that court of appeals erroneously believed it lacked jurisdiction to consider an untimely claim, but holding that, under the facts of the case, petitioner's "garden variety claim of excusable neglect" would not support equitable tolling). And the Court should do so here. Because the dispute at issue involves principally the interpretation of a single clause in the agreement —a clause that the district court itself has already interpreted—the Court should apply its standard and affirm the judgment below.

3. Finally, the foregoing discussion has shared petitioner's premise that the timeliness question here is controlled by the first clause of the regulation governing federal-sector Title VII claims, which requires a plaintiff to make contact with a counselor "within 45 days of the date of the matter alleged to be discriminatory," rather than by the second clause of that regulation, which requires a plaintiff to act "in the case of a personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1). See note 5, *supra*. Both parties and both courts below have proceeded on the premise that the first clause governs, see Pet. App. 20a & n.3, 36a, and petitioner continues to rely affirmatively on that clause of the regulation, Br. 17-18. It is therefore appropriate for the Court to decide the case on that same assumption. That would also effectively allow the Court to speak to the non-federal-sector rule, which parallels the first clause of the regulation.[17]

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[17] See 42 U.S.C. 2000e–5(e)(1) (requiring charge to be filed within 180 or 300 days "after the alleged unlawful employment practice

Yet, setting aside that procedural history for the moment, we note that the premise of petitioner's argument is not obviously correct. Indeed, the premise masks several issues that could otherwise arise in a federal-sector case, but do not arise here, and as to which the case law is currently unsettled.

First, although petitioner suggests that he is seeking to enforce the "broad protection from retaliation" contained in 42 U.S.C. 2000e–3(a), Pet. Br. 2 (quoting *Burlington N. & Santa Fe Ry.*, 548 U.S. at 67), the text of the federal-sector provision of Title VII requires only that "[a]ll *personnel actions* affecting employees" be "made free from any discrimination based on race, color, religion, sex, or national origin," 42 U.S.C. 2000e–16(a) (emphasis added).[18] Thus, it is

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occurred"); EEOC Compliance Manual, *Threshold Issues* § 2-IV C.1.a (explaining that deadline runs from "the date that the charging party received unequivocal written or oral notification of the action, *regardless of the action's effective date*") (emphasis added).

[18] As noted above (see p. 2, *supra*), this Court's 2008 decision in *Gómez-Pérez* v. *Potter*, 553 U.S. 474, did not address whether (or how) "Title VII bans retaliation in federal employment." *Id.* at 488 n.4. The government contends that retaliation is prohibited in the federal sector by Section 2000e–16(a)'s reference to discriminatory "personnel actions," which encompasses a narrower range of adverse actions than does Section 2000e–3(a) under *Burlington Northern & Santa Fe Railway*. See, *e.g.*, United States Amicus Br. at 19 n.5, *Burlington N. & Santa Fe Ry.*, *supra* (No. 05-259) ("the federal government's potential liability under Title VII and its [waiver] of sovereign immunity are limited to retaliation that rises to the level of a 'personnel action'"). At least two courts of appeals since *Gómez-Pérez* have found it unnecessary to reach that contention. See *Morales-Vallellanes* v. *Potter*, 605 F.3d 27, 36 n.12 (1st Cir. 2010), cert. denied, 131 S. Ct. 978 (2011); *Ziskie* v. *Mineta*, 547 F.3d 220, 229 (4th Cir. 2008); but see *Caldwell* v. *Johnson*,

not entirely clear whether a retaliatory constructive discharge such as that alleged here is a "matter alleged to be discriminatory" governed by the first clause of the regulation or a "personnel action" governed by the second clause.

Second, if a constructive discharge is a "personnel action" within the meaning of the second clause, there is a further question whether the limitations period commences on the date that notice of resignation is given or instead on the day of separation. There is scant, but conflicting, authority on that question.[19]

Third, assuming the employee's separation date marks the commencement of the limitations period, there is yet a further question of what happens when the EEO contact occurs in advance of the commencement of the limitations period—in other words, whether a premature EEO contact is nevertheless timely.[20]

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289 Fed. Appx. 579, 588-592 (4th Cir. 2008) (unpublished opinion rejecting contention).

[19] Compare, *e.g.*, *Complainant* v. *McDonald*, EEOC Appeal No. 0120142695, 2015 WL 227117, at *2 (Office of Fed. Ops. Jan. 8, 2015) ("It is the effective date of a personnel action that controls timeliness, not when [c]omplainant submitted his letter of resignation."); *Saleem* v. *McHugh*, EEOC Appeal No. 0120113121, 2011 WL 5507293, at *1 (Office of Fed. Ops. Nov. 4, 2011) (calculating 45 days from January 17 when "[c]omplainant's January 14, 2011 letter indicated that her constructive discharge/resignation was not effective until January 17"); *Tofsfrud* v. *Potter*, No. CV-10-90, 2010 WL 3938173, at *4-*5 (E.D. Wash. Oct. 5, 2010), with *Stewart* v. *Gates*, 786 F. Supp. 2d 155, 160, 165-166 & n.4 (D.D.C. 2011) (using the "effective date" of a personnel action but calculating the 45-day limitations period for an alleged constructive discharge from the date on which the employee "announced * * * that she would resign").

[20] Assuming the "effective date" of petitioner's constructive discharge was March 31, 2010, then his March 22 contact with an

Those issues have not been briefed by the parties or decided by the lower courts in this action, and thus the Court should leave their resolution for another day.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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EEO counselor would have been premature. Cf. *Isbell* v. *United States Postal Serv.*, EEOC Appeal No. 01832803, 1984 WL 485159, at *1-*2 (Office of Fed. Ops. Apr. 3, 1984) (complainant's August 25, 1982 performance review approved a 4% salary increase that would be effective on July 23, 1983; finding that March 25, 1983 contact was untimely as a challenge to the salary increase, because it was not "within 30 calendar days of the effective date").

APPENDIX

1. 42 U.S.C. 2000e–3 provides in pertinent part:

Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

* * * * *

2. 42 U.S.C. 2000e–5 provides in pertinent part:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e–2 or 2000e–3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its

action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant

or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts up on which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less

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[1] So in original. Probably should be subsection "(b)"

than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority

system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expi-

ration of any period of reference under subsection (c) or (d) or this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

* * * * *

3. 42 U.S.C. 2000e–16 provides:

Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for em-

ployment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semi-annual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating

officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or until to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in

which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e–5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e–5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties..[1]

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e–5(e)(3) of this title applicable to compensation discrimination

Section 2000e–5(e)(3) of this title shall apply to complaints of discrimination in compensation under this section.

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[1] So in original.

4. 29 C.F.R. 1614.105 provides in pertinent part:

Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

* * * * *

No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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Black's Law Dictionary (6th ed. 1990) 4

Black's Law Dictionary (10th ed. 2014) 4

Lindemann, Barbara T., et al.,
Employment Discrimination Law
(5th ed. 2012) 9

Restatement (Second) of Contracts (Am.
Law Inst. 1981) 22

U.S. Equal Employment Opportunity
Commission, EEOC Compliance
Manual (2008) 9

Williston, Samuel & Richard A. Lord, *A*
Treatise on the Law of Contracts
(4th ed. 1999) 22

REPLY BRIEF FOR PETITIONER

Without clear text to the contrary, filing periods run only once the claimant has a complete and present cause of action. Petitioner Marvin Green asks this Court to apply this well-established default rule to constructive discharge claims. Because a constructive discharge claim is complete when the claimant resigns, and not before, that is when the filing period begins to run.

The Court-appointed Amica reaches a contrary result only by reading into the applicable regulation an absent command that courts must focus on one element of a constructive discharge claim (precipitating conduct) to the exclusion of the other (resignation) that is no less essential. But the relevant text – from "the date of the matter alleged to be discriminatory," 29 C.F.R. § 1614.105(a)(1) – offers no basis for breaking the two elements apart. Thus, resignation starts the clock.

The Government agrees with all of this. Nevertheless, it seeks to create a dispute over the date of Mr. Green's resignation and asks this Court to resolve it. The Court should not wade into this fact-laden argument, which the Government never raised in the court of appeals. In any event, the Government is wrong. Mr. Green resigned on February 9, 2010, which is when his claim for constructive discharge first became actionable and the filing period began. His claim, filed forty-one days later, was therefore timely.

I. The Filing Period For A Constructive Discharge Claim Does Not Begin To Run Until The Employee Resigns.

A. Under The Default Rule, Filing Periods Start Only Once A Claimant Can File A Claim And Obtain Relief.

This Court interprets limitations periods "against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005) (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)); *see* U.S. Br. 17-18; Petr. Br. 14. But Amica argues that the default rule applies only when the relevant text directs that accrual of a claim triggers the limitations period. Am. Br. 15, 29-30, 32-33.

That is incorrect. This Court applies the default rule whether or not the limitations provision at issue refers to accrual. In *Woods v. Stone*, 333 U.S. 472 (1948), for instance, the Court applied the default rule to determine which of two possible events triggered a limitations provision that ran "from the date of the occurrence of the violation." *Id.* at 472, 476-77, 477 n.4. And, in *United States v. Wurts*, 303 U.S. 414 (1938), the Court applied the default rule to a limitations period that required the government to bring suit "within two years after the making of the [tax] refund," *id.* at 417 (emphasis omitted), rejecting the argument that the period could "begin to run before the right barred by it has accrued," *id.* at 418.

These cases make sense because a default rule that can be invoked only when the text specifies that

accrual starts the clock is not a default rule at all. Rather, dispensing with the default rule "require[s] language so clear as to leave room for no other reasonable construction." *Wurts*, 303 U.S. at 418; *see also Reiter v. Cooper*, 507 U.S. 258, 267 (1993) (noting that the Court "will not infer . . . [the] odd result" of a deviation from the default rule "in the absence of any such indication in the statute").

The cases on which Amica relies underscore that the Court deviates from this rule only when the text of a statute, regulation, or contract demands it. Am. Br. 29-31. In *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 199-200 (1952), for example, the Court relied on an unambiguous statutory distinction between "injury" and "disability." Because, under the statute, the claimant's "injury" triggered the statute of limitations, while the claim accrued upon the claimant's "disability," the Court was "not free" to ignore the clear statutory distinction. *Id.*

Likewise, as our opening brief explains (at 16), *Dodd v. United States*, 545 U.S. 353, 358-59, 360 (2005), held that the relevant limitations provision unambiguously required the filing period to commence on the date this Court recognized a new right, even though the cause of action accrued when this Court made the right retroactively applicable. And *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 134 S. Ct. 604, 610 (2013), stands for the unsurprising proposition that parties may "agree [to] contract" around the default rule.

B. Neither The Text Here Nor This Court's Title VII Jurisprudence Overcomes The Default Rule.

Nothing in the text of the regulation or this Court's Title VII jurisprudence provides any basis for straying from the default rule.

1. The text at issue contains nothing "special" that would "tag" it as a departure from the default rule. *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015) (requiring a "clear statement" to dispense with the default rule that time bars are presumptively nonjurisdictional); *accord* New England Legal Foundation Br. 3 (recognizing that Title VII's timeliness provisions contain "no special allowance" for constructive discharge claims). It provides that a claimant must "initiate contact with a[n EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1).[1]

Amica contends that "matter alleged to be discriminatory" refers only to an employer's precipitating conduct – or, as she and the Tenth Circuit put it, the "last discriminatory act." Am. Br. 20; *see* Pet. App. 20a. But as our opening brief explains (at 17), "matter" describes the whole of a plaintiff's claim – a "subject under consideration," *Black's Law Dictionary* 1126 (10th ed. 2014), or "[s]ubstantial facts forming [the] basis of [a] claim," *Black's Law Dictionary* 978 (6th ed. 1990). And as

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[1] Mr. Green agrees with both the Government and Amica that the "personnel action" clause of 29 C.F.R. § 1614.105(a)(1) is not before the Court. *See* U.S. Br. 15 n.5, 36; Am. Br. 28 n.11.

this Court held in *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004), the whole of a constructive discharge claim is comprised of both precipitating conduct and a resignation. The default rule thereby directs that the filing period for a constructive discharge claim does not run until the claimant has resigned.

Amica's interpretation of the text requires that the resignation element of a constructive discharge claim be disregarded, when in fact it is necessary to prove the claim. *See Suders*, 542 U.S. at 148. Under the default rule, privileging one element over another to determine when the filing period begins, as Amica urges, would require an express textual command.

Pillsbury v. United Engineering Co., 342 U.S. 197 (1952), illustrates this point. There, the statute unambiguously differentiated the elements of the claim, specifying that the plaintiff's disability made the claim actionable, but that the statute of limitations nevertheless ran from the time of injury. *Id.* at 199-200. Here, in contrast, "matter alleged" calls no attention to any particular element of any claim, let alone the precipitating conduct element of a constructive discharge claim.

2. Nor do this Court's employment discrimination cases support Amica's suggestion that "matter alleged to be discriminatory" refers to the employer's last discriminatory act. Am. Br. 20-21. Amica reads these cases as a set of affirmative holdings that limitations periods run from that act. *Id.* at 21-28. But the Court did not hold this in any of those cases. In each case, the relevant conduct fell on the same date that the cause of action accrued. Thus, each case reflects the unexceptional proposition that,

consistent with the default rule, the filing period begins to run when the relevant claim first becomes actionable.

Consider *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), and *Delaware State College v. Ricks*, 449 U.S. 250 (1980), on which Amica heavily relies. Am. Br. 21-25. In those cases, the plaintiffs had actionable claims only once they were forced to resign and denied tenure, respectively. Consistent with the default rule, these were also the dates when the Court determined that the filing periods began to run. *Evans*, 431 U.S. at 558-59; *Ricks*, 449 U.S. at 258.

Amica claims that the Government misapprehends *Evans*. Am. Br. 25 n.8. But that case contains no indication the plaintiff should have filed her claim before it became actionable. As the Government explains, the filing period in *Evans* commenced only upon the plaintiff's forced resignation – that is, her constructive discharge – "not at any previous point when it had already been made clear to her that the employer's longstanding policy would require her to separate." U.S. Br. 27

Ricks is no different. There, the filing period for the plaintiff's termination claim began when that termination became "inevitable" – which coincided with the date the plaintiff's tenure denial became final. *See* Petr. Br. 24-25; U.S. Br. 25-26 (citing *Ricks*, 449 U.S. at 257-58). *Ricks* is therefore consistent with the date-of-resignation rule because a constructive discharge claim does not become inevitable until an employee resigns. *See* Petr. Br. 25; U.S. Br. 12, 25-26.

Amica responds that *Ricks* turned not on the inevitability of the plaintiff's termination but instead on the date of the challenged employment action. Am. Br. 23. But *Ricks* did not distinguish between those two ideas. It held that the statute of limitations ran not from the plaintiff's last day of employment, but instead from the date he received notification of his tenure denial – which, as noted, is when his termination claim first became actionable. *See Ricks*, 449 U.S. at 258-59.

Amica's other cases also align with the default rule. In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 631 n.3 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, this Court explained that the employee "could have, and should have, sued" when the discriminatory action was taken against her, because at that point she had a "fully formed" cause of action. Similarly, *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (per curiam), held that the limitations period began running when the employer gave the plaintiffs definitive notice of their terminations, which coincided with the accrual of their claims.

Likewise, *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002), held that the filing periods for the claims at issue ran from the time each claim accrued. With regard to discrete claims, such as termination, the filing periods run from when each wrongful act occurred. *Id.* at 113-14. And for hostile work environment claims, the filing period may run from "any act that is part of the hostile work environment," *id.* at 118, that is, from any act that renders that type of claim actionable.

3. Notwithstanding the default rule, Amica argues that the principle that waivers of sovereign immunity are strictly construed requires the Court to construe the text against Mr. Green. Am. Br. 33. But the strict-construction rule does not apply here. Congress indisputably has waived the Postal Service's sovereign immunity to suit for violations of Title VII, including for constructive discharge claims. Once the Government "waives its immunity and does business with its citizens, it does so much as a party never cloaked with immunity." *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002). Thus, "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties." *Id.* at 145 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)). Moreover, 29 C.F.R. § 1614.105(a)(1) is not itself a waiver of sovereign immunity, and so a strict-construction principle cannot apply to it. *See Gomez-Perez v. Potter*, 553 U.S. 474, 490-91 (2008).

C. Resignation Triggers The Filing Period For A Constructive Discharge Claim.

Because the default rule applies here, the filing period for a constructive discharge claim may not start until the employee resigns.

1. Amica contends that "[i]n a constructive discharge, an employee suffers injury and has a complete and present cause of action for discrimination under Title VII as soon as the employer commits the predicate unlawful discriminatory practice; the employee's later resignation changes only the damages recoverable for that violation." Am. Br. 36-37.

a. Amica may mean that resignation is not a required element of a constructive discharge claim. But this argument would run headlong into the holding in *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004), that constructive discharge is a separate cause of action that necessarily includes precipitating conduct and a resignation. Both elements are indispensable to the claim, and the filing period cannot begin until both are present. Without the "employee's decision to leave," there can be no "constructive discharge assertion." *Id.* This argument is also at odds with all other relevant authority.[2]

b. Amica may instead be arguing that a constructive discharge claim is not a genuine, separate cause of action, but simply enhances the damages available for an employer's prior discriminatory acts. In this regard, she maintains that a constructive discharge is only "assimilated to a formal discharge for *remedial purposes*." Am. Br. 18 (quoting *Suders*, 542 U.S. at 141).

But in a constructive discharge claim, a resignation is not merely "damages-enhancing." Am. Br. 20 (quoting *Suders*, 542 U.S. at 148). As noted, resignation is an essential element of what an employee must prove to succeed on the merits of the claim. *See Suders*, 542 U.S. at 148; *Mac's Shell*

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[2] *Mac's Shell Serv., Inc. v. Shell Oil Prods. Co.*, 559 U.S. 175, 184 (2010); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894 (1984); *see also* U.S. Br. 19-20 (citing 1 Barbara T. Lindemann et al., *Employment Discrimination Law* 21-46 (5th ed. 2012) & EEOC Compliance Manual (BNA) § 612.9(a) at 612:0006 (2008)).

Serv., Inc. v. Shell Oil Prods. Co., 559 U.S. 175, 184 (2010); Petr. Br. 17-18.

To be sure, discriminatory conduct preceding a constructive discharge is likely to be "independently actionable." Am. Br. 19. But, as with wrongful terminations, proving a constructive discharge requires showing the additional, distinct harm of a forced departure. *Suders*, 542 U.S. at 148. This harm entitles the claimant to additional damages – the same remedies that would accompany a wrongful termination. *Id.* at 141. The antecedent conduct to which Amica refers may trigger "limitations periods associated with [other] claims arising from such prior acts." U.S. Br. 22. This truth, however, has no bearing on the point at which a constructive discharge claim accrues. As new claims arise, each "starts a new clock for filing charges." *Nat'l Passenger R.R. Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

A constructive discharge claim does carry potential damages not available while the employee remains on the job. But, once again, the same is true of an ordinary termination. For example, an employee who is first subjected to on-the-job discrimination and later fired with the same motive may be entitled to "enhanced" damages associated with the firing, such as back pay. In that case, no one disputes that the underlying claim and the firing claim are each actionable, and that the firing is subject to a separate limitations period that does not begin to run until the firing occurs. *See Morgan*, 536 U.S. at 114. The same is true here.

2. Under *Suders*, the act that renders a constructive discharge claim actionable is the

employee's resignation, which is "assimilated to" a termination. 542 U.S. at 141. This decision to resign is "legally imputed to the employer." U.S. Br. 24 (discussing *Mac's Shell*, 559 U.S at 185). As a consequence, even if Amica were correct, countertextually, that the "matter alleged to be discriminatory" in 29 C.F.R. § 1614.105(a)(1) could be said to demand a singular focus on an employer's last allegedly discriminatory act, the resignation would be the employer's "last act" triggering the filing period. Am. Br. 32. That the employee, rather than the employer, "formally puts an end to the particular legal relationship" simply makes the discharge "constructive." *Mac's Shell*, 559 U.S. at 185.

3. Our opening brief explains (at 21-23) that the great weight of authority holds that limitations periods for state-law constructive discharge and constructive eviction begin when the plaintiff terminates the legal relationship, and not before. Amica responds that Mr. Green's reliance on state-law analogues is misplaced, Am. Br. 34-35, but this Court has looked to state law for guidance in the limitations context, *see Wilson v. Garcia*, 471 U.S. 261 (1985); *see also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1968 (2014) (describing the general practice). And, in *Mac's Shell*, the Court relied on state-law constructive eviction principles to support its holding that a constructive termination claim under the Petroleum Marketing Practices Act could not exist until the franchisee had actually terminated its franchise. 559 U.S. at 184-85.

Amica also notes that, in the state-law constructive discharge context, many courts "did not consider whether the limitations period could run

from the time of the employer's last discriminatory act," but rather were choosing only between the employee's resignation and her last day of work. Am. Br. 34-35. That observation only underscores that, in light of the default rule, courts have not thought it plausible that the filing period could run before the claim existed.

D. The Date-Of-Resignation Rule Promotes Title VII's Goals Of Conciliation, Fairness, And Administrability.

1. *Conciliation.* The date-of-resignation rule enables employees to make informal, good-faith efforts to resolve concerns through "internal channels" before initiating more formal administrative procedures. NAACP Legal Defense & Education Fund, Inc. et al. (LDF) Br. 11; *see* Petr. Br. 34-38. Amica is right that formal EEO mediation sometimes promotes conciliation. Am. Br. 38. But informal employee-employer discussions that take place before and outside the EEO counseling process may be more effective in resolving an employment dispute.

Even if initiating "pre-complaint counseling does not entail filing a complaint," Am. Br. 39, that decision triggers strict deadlines. These deadlines push employees into adversarial proceedings even before the more informal approach they and their employers might prefer has run its course. *See* Petr. Br. 35; LDF Br. 24 (noting that "a rush to adversarial processes is counter to the spirit of Title VII"). Avoiding third-party involvement may be particularly critical for employees who fear retaliation or the possibility of being labeled a

troublemaker. *See* LDF Br. 14 (emphasizing that many employees fear that a "formal report of discrimination functionally terminates the employment relationship").

Amica contends that permitting a constructively discharged employee to seek out an EEO officer after she has resigned delays conciliation until after "the point of no return." Am. Br. 2; *see also id.* at 39. Not so. An employee's constructive discharge is no more irrevocable than an employee's termination. In both circumstances, the EEO process contemplates successful conciliation, including reinstatement.

2. *Fairness.* Amica opts not to defend the last-discriminatory-act rule on fairness grounds. She contends only that equitable doctrines, such as tolling, might rescue the lay claimant from the potentially unfair consequences of the Tenth Circuit's rule. Am. Br. 45. But the suggestion that some complainants may be able to extend a missed deadline cannot save a rule at odds with the overarching principle of "ensur[ing] that the lay complainant . . . will not risk forfeiting his rights inadvertently." *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115 (2002); *see also* Petr. Br. 32-33. Moreover, as this Court has recognized, "Federal courts have typically extended equitable relief only sparingly." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (declining to apply tolling); *see also, e.g., Rivera-Díaz v. Humana Ins. of P.R., Inc.*, 748 F.3d 387, 390 (1st Cir. 2014) (equitable tolling is "reserved for exceptional cases"); *Jones v. Res-Care, Inc.*, 613 F.3d 665, 670 (7th Cir. 2010) ("The Supreme Court has instructed that equitable tolling is a

doctrine to be applied sparingly in Title VII cases." (citation omitted)).

Amica's misplaced reliance on equitable tolling underscores that, standing alone, the date-of-resignation rule is fairer to lay claimants navigating an admittedly "rigorous" administrative process. Am. Br. 44-45 (quoting *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976)); *see also* Petr. Br. 32-34; U.S. Br. 30-31. Because lower courts disagree over the working conditions that qualify as intolerable, it is especially challenging for an employee to assess whether, absent resignation, the discrimination she has suffered is sufficient to file a claim. LDF Br. 16-17, 21. Under the last-discriminatory-act rule, an employee in that position could even run out of time before she has an actionable claim for constructive discharge. This confusion may advantage sophisticated employers over unwary employees. Petr. Br. 37-39; LDF Br. 25.

3. *Administrability.* Because a resignation, like a termination, is almost always a discrete, readily identifiable event, the date-of-resignation rule is easier for agencies and courts to administer. *See* Petr. Br. 31. "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). But, as just noted, it is frequently difficult to isolate the discriminatory act that justifies an employee's decision to resign.

Amica says that evaluating any discrimination claim inherently requires identifying and classifying last discriminatory acts. Am. Br. 43. But the last-discriminatory-act rule draws forward thorny

questions of what conduct was discriminatory and what conduct was benign to the threshold stage of litigation, largely duplicating a merits inquiry. Though complexity may be unavoidable at the merits stage, that is no reason to inject it at the threshold, particularly when an easily administrable alternative – the date-of-resignation rule – is available. *See* Petr. Br. 28-32.

This Court has favored simplicity in a related context. When considering threshold issues of jurisdiction, the Court has emphasized that "rules should be clear." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002); *see also Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010) (placing "primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible"). Given the difficulties inherent in the last-discriminatory-act rule, the date-of-resignation rule aligns with this preference for a "simple approach" to limitations periods. *See Wilson v. Garcia*, 471 U.S. 261, 275 (1985).

Amica also states that the Tenth Circuit's rule adds "no unusual complexity" because claimants need only allege – not prove – when the last discriminatory act occurred. Am. Br. 43. But, when challenged, compliance with filing deadlines must be proved. *See, e.g., Smith v. United States*, 133 S. Ct. 714, 721 (2013) ("[T]he Government must prove the time of the conspiracy offense if a statute-of-limitations defense is raised."); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 725 F.3d 65, 90-91 (2d Cir. 2013) (noting that the defendant's statute-of-limitations argument went to the jury). That proof would be more complex

and more frequently contested under the Tenth Circuit's rule.

In addition, Amica nowhere defends the primary concern that led the Tenth Circuit to reject the more administrable date-of-resignation rule – that claimants are apt to file delayed claims. Pet. App. 20a-21a. Amica thus tacitly acknowledges that the filing of stale claims is highly unlikely and that belated resignation jeopardizes success on the merits. *See* Petr. Br. 36-37; U.S. Br. 28; LDF Br. 24-25.[3]

Rather, Amica focuses on trying to bolster the Tenth Circuit's rule. But in doing so she introduces greater complexity into a rule that is already far less administrable than the date-of-resignation rule. Claimants, she argues, may simply amend existing complaints to add a claim for constructive discharge. Am. Br. 40. "That proposed solution leaves much to be desired." U.S. Br. 30. When constructive discharge claims are brought on a stand-alone basis, there will be no prior claim to amend, and so, for those claims, Amica's prescription is no solution at all. *See* Petr. Br. 33 (citing stand-alone constructive discharge cases). In other cases, as the Government

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[3] One amicus brief trumpets the Tenth Circuit's delay hypothesis, but without authority. Equal Employment Advisory Council et al. Br. 20-22. Constructive termination and eviction causes of action have been recognized for many decades, *see Mac's Shell Serv., Inc. v. Shell Oil Prods. Co.*, 559 U.S. 175, 184 (2010), and the great weight of authority provides that the limitations periods for these actions may not run until the plaintiff severs the relationship, Petr. Br. 21-23. But this amicus brief does not cite a single case to support its assertion that the date-of-resignation rule promotes inappropriate delay.

explains, Amica's argument depends on the unfounded assumption that the request to amend will be granted. U.S. Br. 30; *see also* Petr. Br. 34. The date-of-resignation rule poses none of these problems.

II. The Government's New Argument Concerning When Petitioner Resigned Is Not Before The Court And Is Wrong In Any Event.

A. The Only Question Before This Court Is Whether The Filing Period Runs From The Date Of Resignation.

1. In a nearly verbatim reprise of its brief in opposition, the Government insists that, under his agreement with the Postal Service, Mr. Green resigned on December 16, 2009, and so his claim was untimely under the date-of-resignation rule. U.S. Br. 32. The Government did not make this argument in the court of appeals, and "this Court will affirm on grounds that have not been raised below . . . only in exceptional cases." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 272-73 (2009) (internal quotation marks omitted) (ellipsis in original). The Government's new, fact-bound argument is therefore forfeited. *Id.*; *see United States v. Jones*, 132 S. Ct. 945, 954 (2012).

What is more, the Government contended precisely the opposite in the Tenth Circuit, repeatedly maintaining that the agreement did *not* constitute Mr. Green's immediate resignation but rather gave him an option to resign before March 31, 2010, or, if he chose not to resign, to transfer to Wyoming. In designating the "issues presented for review" in its Tenth Circuit brief, the Government maintained that the "settlement agreement" provided

that Mr. Green "would either accept a transfer [to Wyoming] or resign by March 31, 2010." U.S. C.A. Br. 1-2. Similarly, the Government's brief explained that, under the settlement agreement, "Mr. Green [was] to receive full salary, while relinquishing the Englewood postmaster position and agreeing to either retire or accept transfer to Wyoming." *Id.* at 36. The Government made similar assertions at least five more times in its Tenth Circuit brief. *Id.* at 19, 24, 44, 47, 50; *see* Pet. Reply 8-9, 9 n.2 (detailing the Government's statements).

In keeping with the Government's contentions below, the Tenth Circuit viewed February 9, 2010, as Mr. Green's resignation date. That court found that the settlement agreement permitted Mr. Green to "*choose* either to retire or to work in a position that paid much less and was about 300 miles away." Pet. App. 2a (emphasis added); *see also id.* at 5a. "Ultimately," it concluded, Mr. Green "decided to retire." *Id.* at 2a. If, as the Government now suggests, Mr. Green resigned on December 16, the court of appeals would have had no reason to analyze at length its reasons for choosing the last-act rule over the date-of-resignation rule. *See* Pet. App. 15a-23a.[4]

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[4] Although the Government is correct that the district court's summary-judgment opinion indicated that Mr. Green retired by signing the agreement, *see* U.S. Br. 34, the district court stated at another point (when denying the Government's motion to dismiss the constructive discharge claim on inadequate-pleading grounds) that the agreement "mandated that by March 31, 2010, Plaintiff must either retire or transfer to a position 400 miles away in Wyoming." Order at 4 (D. Ct.

2. Forfeiture aside, this Court is "a court of final review and not first view." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001)). This Court, therefore, should not consider the issue.

In asking the Court to resolve the issue, the Government relies on cases that involved procedural circumstances markedly different from those here. *See* U.S. Br. 35-36. For instance, *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 740-41 (2013), turned on the legal definition of a "vessel." After the Court announced the applicable rule, there was "nothing to be gained" by remanding the case because no relevant facts were disputed. *Id.* at 745-46. Similarly, in *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 732-33 (2013), the Court refused to remand a case for further proceedings when the losing party had already disclaimed any intention of developing a factual record that might alter the result. And in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 70 (2006), the Court did not remand because it adopted a less stringent legal standard for the prevailing party than the one the jury had applied. *See also Global-Tech Appliances,*

Doc. 19). So the district court's understanding of the agreement is unclear.

In any case, the district court's understanding is irrelevant in light of the Tenth Circuit's statements that the settlement agreement gave Mr. Green the option, until March 31, 2010, to retire or assume the Wyoming position. Pet. App. 2a, 5a.

Inc. v. SEB S.A., 131 S. Ct. 2060, 2071 (2011) (jury's finding for the prevailing party on a fully developed factual record could not be altered on remand by applying the Court's new legal test).

Here, in contrast, there has been no trial, and the case came to the Tenth Circuit on the Government's summary-judgment motion. In addition, as explained immediately below, the record contains abundant evidence that Mr. Green resigned on February 9, not on December 16. Therefore, this Court should simply answer the question presented and reverse.

B. The Settlement Agreement Gave Mr. Green A Choice Either To Retire Or To Accept A Transfer, Making His EEO Contact Timely.

If the Court decides to wade into the issue of when Mr. Green retired, February 9, 2010, is the correct date. On summary judgment, a court views the facts "in the light most favorable to the opposing party." *Tolan v. Cotton*, 134 S. Ct. 1861, 1867 (2014) (per curiam) (internal quotation marks omitted). Following that standard, the Court should interpret the agreement as providing Mr. Green an option to retire or take a position in Wyoming, which he exercised on February 9.

In relevant part, the agreement reads: "Mr. Green agrees to retire from the Postal Service no later than March 31, 2010. Mr. Green agrees to take all necessary steps to effect his retirement on or before March 31, 2010. If retirement from the Postal Service does not occur Mr. Green will report for duty in Wamsutter, Wyoming on April 1, 2010." J.A. 60-61. Taken as a whole, this language supports Mr.

Green's view – repeatedly advanced by the Government below and adopted by the court of appeals, Pet. App. 2a, 5a – that the agreement provided Mr. Green with the option to retire or to report to the position in Wyoming.

The Government suggests that Mr. Green's representative, Robert Podio, entered into negotiations to effect Mr. Green's immediate, unconditional resignation. U.S. Br. 4. To the contrary, Mr. Podio stated that he viewed the agreement as authorizing Mr. Green to "either retire from USPS . . . or alternatively, if he decided not to retire . . . to transfer to a lower position" in Wyoming. J.A. 63.

To be sure, the record includes a statement by the Postal Service's negotiator, David Knight, that it was his "understanding" that, by signing the agreement, Mr. Green agreed to retire and not report to Wyoming. J.A. 51; *see* U.S. Br. 34 n.15. But Mr. Knight also told the Postal Service's EEO investigator probing the constructive discharge complaint that Mr. Green had an option: "the agreement stated that if [Mr. Green] did not retire, he would assume another Postmaster position at a lower level." Resp. to Mot. for Summ. J., Ex. 26, at 8 (D. Ct. Doc. 106-26). Furthermore, Charmaine Ehrenshaft, a Postal Service labor-relations manager who was kept aware of the negotiations as they were unfolding, J.A. 53, told the same investigator that "one of the terms of [the] agreement was a retirement *option*." Resp. to Mot. for Summ. J., Ex. 26, at 6 (D. Ct. Doc. 106-26) (emphasis added). And the agency's EEO decision based on this investigation concluded that a "fair reading of the agreement" gave

Mr. Green "the choice to retire or report to a new job." J.A. 23.[5]

Despite this evidence that the agreement provided Mr. Green with an option, the Government asserts in this Court that the agreement's reference to the Wyoming position "merely provided for contingencies in which retirement did not happen by" the end of March. U.S. Br. 33. That is a puzzling interpretation. If, under the agreement, Mr. Green had in fact resigned on December 16, he would have fully performed on the contract. It would not have been necessary to plan for "contingencies."

Although it is not clear, the Government appears to suggest that, rather than providing Mr. Green with the option to go to Wyoming, the agreement provided for something akin to liquidated damages in the event that Mr. Green did not effectuate his retirement. This makes no sense. Under the Government's interpretation, Mr. Green would have breached the agreement if he had not effectuated his retirement. But the apparent damages for this breach would have gone to Mr. Green, the breaching party, in the form of continued employment with the Postal Service in Wyoming. It is odd, to say the least, that the agreement would provide Mr. Green with

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[5] Even assuming the agreement is ambiguous, that ambiguity should be construed against the Government under the "generally accepted principle that any ambiguity . will be interpreted against the drafter." 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 32:12 (4th ed. 1999); *accord United States v. Seckinger*, 397 U.S. 203, 210 (1970); Restatement (Second) of Contracts § 206 (Am. Law Inst. 1981).

continued employment after he breached the contract that supposedly demanded his immediate departure.

* * *

Resolving the question on which this Court granted review depends not on the Government's thirteenth-hour factual claim, but instead on application of a familiar default rule to the filing period governing constructive discharge cases. Holding the Government to its repeated assertions below that Mr. Green had an option to resign or assume another position facilitates resolution of that question: whether the last-act rule or the date-of-resignation rule controls. For the reasons explained above, the date-of-resignation rule comports with the established default rule, this Court's employment discrimination precedents, and Title VII's goals.

CONCLUSION

The judgment of the court of appeals should be reversed.

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No. 14-613

In the Supreme Court of the United States

MARVIN GREEN, PETITIONER

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Statutes, regulations, and rule:

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United States Equal Employment Opportunity Commission:
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Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110) (2015), www.eeoc.gov/federal/directives/upload/md-110.pdf 9, 10, 18
National Enforcement Plan, Part V.D, www.eeoc.gov/eeoc/plan/nep.cfm (last visited Oct. 27, 2015) 13

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TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR RESPONDENT

Our opening brief contended that the court of appeals adopted an erroneous rationale but still reached the correct result in this case. In our view, when a retaliation claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, depends on the presence of a constructive discharge, the period for initiating administrative consideration of that claim does not begin until the employee gives notice of the resignation that is allegedly attributable to the employer. Resp. Br. 14-32.[1]

In defending the court of appeals' rationale, the Court-appointed amicus curiae contends (Br. 2) that the period instead begins when the employer commits "the last discriminatory act * * * that led to [the

[1] Our opening brief contended that the court of appeals reached the correct result because petitioner gave his notice of resignation on the same day as the employer's last act. Resp. Br. 32-39. This reply brief does not address that portion of our argument, on which we are not "supporting petitioner," Sup. Ct. R. 25.3.

employee's] resignation," a date that often occurs before a plaintiff's constructive-discharge claim has even accrued. That is incorrect. The regulatory text on which the amicus relies does not dictate her result, because its reference to the "matter alleged to be discriminatory" (29 C.F.R. 1614.105(a)(1)) merely poses rather than resolves the question whether the constructive discharge itself is a discriminatory act that is imputed to the employer. Equally to the point, her position is based largely on the assumption that a constructive-discharge claim and a claim based on the underlying conduct without an accompanying resignation are the same claim, and the discharge merely expands the available remedies. But the claims are not the same; indeed, *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004), described a constructive-discharge claim and a claim about the underlying conduct absent resignation as "two claims." *Id.* at 149. Nor do policy considerations support the court of appeals' rationale, since the supposed threat posed by allowing an employee to extend the limitations period by delaying his resignation is counterbalanced by the need, in the constructive-discharge context, to prove that working conditions were unendurable.

The Court should reject the rationale of the decision below and instead endorse the notice-of-resignation rule adopted by most of the courts of appeals that have confronted the question, which has been applied for many years without giving rise to any evident practical difficulties.

A. The Period For Raising A Constructive-Discharge Claim Should Not Begin Before It Can Even Be Established That There Will Be A Discharge

As relevant here, a federal-sector employee raising a Title VII claim must "initiate contact" with an equal-employment-opportunity (EEO) counselor "within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. 1614.105(a)(1); see Resp. Br. 15 & n.5.[2] In the constructive-discharge context, that 45-day period should not begin until the employee has given notice of the resignation that will, if a constructive-discharge is proved, be attributable to the employer.

The amicus does not dispute our previous explanation that, under standard statute-of-limitations principles—which have generally been applied to the time limits associated with the exhaustion and filing of Title VII claims in the private and federal sectors (Resp. Br. 16-17)—a limitations period will commence only when a plaintiff has a complete and present cause of action on which he can file suit and obtain relief (*id.* at 17-18). Nor does she deny that an employee cannot even allege that there has been a constructive discharge until he has made and announced his decision to resign. *Id.* at 18-23. Instead, the amicus contends (Br. 29-33) that the usual rule is inapplicable here because the text of

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[2] As the amicus notes (Br. 8), the Equal Employment Opportunity Commission (EEOC or Commission) has announced its intention to issue a notice of proposed rulemaking to amend Part 1614's provisions governing the federal-sector EEO complaint process. The Commission sought comments on a wide variety of issues that might be addressed in that rulemaking, including whether the 45-day deadline, or any of the other time limits, should be changed. See 80 Fed. Reg. 6669 (Feb. 6, 2015). It has not indicated what the scope of its proposal will be or when it will be published.

the regulation supposedly requires otherwise. But that view depends on a false equivalence between the constructive discharge itself and the underlying discriminatory conduct that precipitated the employee's decision to resign.

1. The amicus characterizes (Br. 17-21) a constructive-discharge claim as materially identical to a potentially antecedent claim challenging the employer's discriminatory conduct before it was known to be resignation-precipitating conduct. In her view, the only difference between those two claims is the ability to request remedies (such as reinstatement and back pay) that would not be available in the absence of a discharge. This argument relies on snippets from *Suders*, *supra*, but disregards their context.

a. *Suders* did state that a constructive discharge is "assimilated to a formal discharge for remedial purposes," 542 U.S. at 141, and that the two kinds of discharges are "functionally the same * * * in damages-enhancing respects," *id.* at 148. But the Court did not, as the amicus infers, declare that the extent of remedies is the "only" (Amicus Br. 20) way in which discharge claims can be assimilated.

Suders was about "one subset of Title VII constructive discharge claims"—those involving a hostile work environment "attributable to a supervisor," 542 U.S. at 143—and the employer's ability to invoke the affirmative defense articulated in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *Boca Raton*, 524 U.S. 775 (1998), for cases in which supervisor harassment is unaccompanied by an adverse official act. The Court explained that a constructive discharge "may be effected through co-worker conduct, unofficial supervisory conduct, or official company

acts." *Suders*, 542 U.S. at 148. And it held that the affirmative defense is not available when the constructive discharge does involve an "official" act. *Id.* at 140, 148. In doing so, the Court did not deal only with what form any remedy would take. Instead, it addressed when an employer could or could not be held liable at all for the consequences of its supervisor's actions.

b. The amicus is, of course, correct in noting (Br. 19) that there will be no valid constructive-discharge claim that is independent of any discriminatory (or retaliatory) conduct. That is a function of Title VII itself, which prohibits federal-sector personnel actions only when they are not "free from any discrimination." 42 U.S.C. 2000e–16(a); see also 42 U.S.C. 2000e–2(a), 2000e–3(a) (defining unlawful employment practices for private employers). But that does not mean that a constructive discharge and the conduct that preceded the resignation are always a single claim.

To suggest the opposite, the amicus contends (Br. 19) that the discriminatory conduct that underlies a constructive discharge will be "independently actionable." In fact, that will often, but not necessarily always, be true. In *EEOC* v. *University of Chicago Hospitals*, 276 F.3d 326 (7th Cir. 2002), for instance, the Commission brought a stand-alone constructive-discharge claim where statements reflecting religious discrimination did not rise to the level of creating a hostile work environment yet created an allegedly reasonable belief in the employee that she would be fired if she did not resign. *Id.* at 332-333. The Seventh Circuit recognized that "it is not necessary that the incidents that surround the constructive discharge themselves constitute actionable religious discrimination." *Id.* at 333. But see *Ames* v. *Nationwide Mut.*

Ins. Co., 760 F.3d 763, 769 (8th Cir. 2014) (noting that the court has not recognized the Seventh Circuit's alternative form of constructive discharge), cert. denied, 135 S. Ct. 947 (2015).

More to the point, *Suders* itself implicitly rejects the amicus' conclusion (Br. 20) that a constructive-discharge claim is *the same claim* as one based only on the underlying discriminatory conduct. For hostile-work-environment purposes, *Suders* describes a plaintiff's need to prove "two claims" and characterizes the underlying hostile-environment claim as a "lesser included component" of "the graver claim of hostile-environment constructive discharge." 542 U.S. at 149 (emphasis omitted). And that makes good sense. Just as a termination is a separate claim from one about a preceding demotion, an employee's resignation—when treated constructively as a termination—may be a separate claim from an independently actionable one that preceded it.

Suders is entirely consistent with that approach. The amicus suggests otherwise, asserting (Br. 19) that the employer's "predicate discrimination"—rather than the "working conditions" that result—is the exclusive "target of [a constructive-discharge] claim." But the Court expressly held that a constructive discharge requires more than underlying discrimination; the employee must also "show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." 542 U.S. at 134; see *id.* at 141 (a constructive discharge is "an employee's reasonable decision to resign because of unendurable working conditions").[3] And it recognized that "[a]

[3] *Suders* thus rejected the reform proposed by the law-review comment on which the amicus relies (Br. 19, 42 n.16). See Cathy

constructive discharge" always involves more than the employer's own conduct, because it "involves *both* an employee's decision to leave and precipitating conduct." *Id.* at 148 (emphasis added); accord *Mac's Shell Serv., Inc.* v. *Shell Oil Prods. Co.*, 559 U.S. 175, 184 (2010); see Resp. Br. 19-20.

c. Despite *Suders*'s focus on when a constructive discharge can be sufficiently attributable to official action to permit the employer to be held liable, the amicus (like the court of appeals) refuses (Br. 20) to "endorse the *legal fiction* that the employee's resignation, or notice of resignation is a 'discriminatory act' of the employer." Pet. App. 20a (emphasis added). Abjuring legal fictions can be a good thing. But doing so here flouts the reason for having a *constructive*-discharge doctrine, which, as the plain meaning of its name conveys, deems a discharge to "exist[] by virtue of legal fiction" even when there is none "in fact." *Black's Law Dictionary* 380 (10th ed. 2014) (definition of *constructive*). Although a resignation is, in actuality, the act of an employee, it is one that is "[l]egally imputed" (*ibid.*) to the employer in the form of a discharge. See Resp. Br. 24.

What is more, the purpose of recharacterizing the employee's resignation as a discharge by the employer is to permit the employer to be held "responsible for a constructive discharge in the same manner that it is responsible for [an] outright discriminatory dis-

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Shuck, Comment, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 Berkeley J. Emp. & Lab. L. 401, 445 (2002) (proposing that courts should ask only whether an employee resigned "in response to an employer's intentional, illegal discrimination" and cease to "inquir[e] into the reasonableness of the employee's resignation").

charge." *Suders*, 542 U.S. at 142 (quoting 2 EEOC Compliance Manual § 612.9(a) (2002)). That purpose would be defeated if the Court were to disregard the resignation when identifying the last act necessary to give rise to a constructive-discharge claim, because the limitations periods would then not run from the time that the discharge is announced in both kinds of cases.

2. Like the court of appeals (Pet. App. 22a), the amicus attempts to square the circle by noting (Br. 40) that an employee may avail himself of the right to "amend [an administrative] complaint at any time prior to the conclusion of the [agency's] investigation to include issues or claims like or related to those raised in the complaint." 29 C.F.R. 1614.106(d). In claiming, however, that "the EEOC has long endorsed this procedure" (Br. 40), the amicus invokes a document that belies her fundamental rationale.

Under the amicus' conception, an employee who has been subjected to discriminatory conduct that *might* precipitate a subsequent resignation should follow a two-step process to protect any eventual constructive-discharge claim. He should initiate a timely challenge to the underlying conduct alone, and then, "should he later resign," he may "amend his complaint to include a related constructive-discharge claim." Amicus Br. 40. To illustrate the potential for such an amendment, the amicus identifies (Br. 40-41) the following example from an EEOC manual:

> An agency employee files a complaint of discrimination when his request for a hardship transfer is denied. During the investigation into his complaint, the complainant sends a letter to the EEO office stating that he has decided to resign from the agency because of the agency's failure to transfer

> him and the resulting stress. He further states that he is no longer seeking the transfer as a remedy to his complaint, but asserts he is entitled to a compensatory damages award instead. The EEO office should amend the original complaint to include the complainant's new like or related claim of constructive discharge.

EEOC, *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110)*, at 5-13 (2015), www.eeoc.gov/federal/directives/upload/md-110.pdf. While appropriately seizing on that example as proof of the *possibility* of an amendment "in the precise context of constructive discharge," Amicus Br. 40, the amicus overlooks the example's purpose, which supports our understanding about the separate nature of the claims (and does not remotely suggest that a mandatory two-step process would be more consistent with Title VII's purposes, cf. pp. 17-19, *infra*).

The example is part of the Commission's explanation of what should happen "when an alleged discriminatory incident occurs after the filing of an EEO complaint." *EEO-MD-110*, at 5-10. Such a "discriminatory incident" may fall into one of three categories: (1) it may be "additional evidence offered to support the existing claim, but" not "a new claim in and of itself"; (2) it may "raise[] a new claim that is like or related to the claim(s) raised in the pending complaint"; or (3) it may "raise[] a new claim that is not like or related to" pending claims and should therefore be the subject of a separate EEO complaint. *Ibid.* (emphasis omitted). The constructive-discharge example is used to illustrate the second category (a new claim). What is more, according to the Commission's description, it consti-

tutes a new claim even when the employer has done nothing new; the only development is the hypothetical employee's "deci[sion] to resign"; and the employee makes it clear that the "new * * * claim of constructive discharge" is causing him to seek a new "remedy" ("compensatory damages" rather than a "transfer"). *Id.* at 5-13. The example could scarcely be further from the amicus' basic premise, under which this scenario should have been placed in the first category (as involving only new evidence about the scope of remedies available under the original discriminatory-failure-to-transfer claim).[4]

In other words, the Commission understands that a constructive-discharge claim really is different from one that involves *only* the employer's underlying conduct (before any decision to resign). That is not to say that an employee could not, as the court of appeals contemplated, bring two claims and have them consolidated (just as he could if a demotion were later followed by a termination).[5] But that possibility should not rule out the straightforward approach of treating a constructive discharge as a new claim arising out of

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[4] The EEOC's willingness to treat a constructive discharge as a "new incident of alleged discrimination," *EEO-MD-110*, at 5-10, 5-13, squarely refutes the suggestion (Amicus Br. 28 n.10) that a resignation cannot, once imputed to the employer, be a "matter alleged to be discriminatory" under 29 C.F.R. 1614.105(a)(1).

[5] Consolidating two claims into one complaint would not, as the amicus suggests, prevent the *claims* from "multiplying," Br. 41 n.15 (brackets omitted), because what could have been one claim of constructive discharge would instead be two claims. And if the two-step process were needed to preserve the viability of inchoate constructive-discharge claims, that would invite more prophylactic claims at step one than would otherwise be brought as ripened constructive-discharge claims under the notice-of-resignation rule.

a new discriminatory act attributable to the employer, which therefore triggers a new limitations period. See *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002) ("Each discrete discriminatory act starts a new clock for filing charges alleging that act.").

3. Nor is the court of appeals' approach compelled by this Court's pre-*Suders* decisions discussing the timeliness of non-constructive-discharge claims.

The amicus understandably emphasizes (Br. 21-23) the distinction that the Court drew in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), between "the time of the *discriminatory* acts" and "the time at which the *consequences* of the acts become most painful." *Id.* at 258 (citation omitted). But, as discussed in our opening brief (Resp. Br. 25-26), the logic of *Ricks* was limited to the particular consequences that were inherent in the original discriminatory acts (there, a termination of employment that was a "delayed, but inevitable, consequence of the denial of tenure"). 449 U.S. at 257-258. The same is true of *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (per curiam), which is "indistinguishable" from *Ricks*, *id.* at 8. In both cases, the employer had made a single decision that, when it was made, necessarily meant that the employee would later be terminated. The limitations period for challenging the termination therefore began to run when "the operative decision was made—and notice given." *Ibid.*

Here, by contrast, the employer's decision was not the "operative" one for purposes of a constructive discharge, because, until petitioner gave notice of his own decision to resign, the employer's own actions had been insufficient to create a discharge (constructive or otherwise). Indeed, in applying *Ricks* to the facts of this case, the amicus says that, once petitioner "agreed

to retire," there was "no further decision to make." Amicus Br. 23; see *id.* at 22 ("[T]he only discrimination alleged in [petitioner's] amended complaint occurred when (or before) he received and signed the settlement agreement."). But that conflates two different events: the presentation to petitioner of an offer that included his retirement, and his acceptance of that offer. Until petitioner gave notice that he had decided to retire, it had not yet become clear that the consequences of the Postal Service's actions would include his retirement.[6]

4. Focusing on the moment when there is definitive notice that a resignation will occur also provides an important symmetry between actual- and constructive-discharge claims. As the EEOC has explained in the context of cases against private employers, the time for challenging "[a] discrete act, such as * * * termination," runs from "the date that the charging party received unequivocal written or oral notification of the action, regardless of the action's effective date." EEOC Compliance Manual, *Threshold Issues* § 2-IV C.1.a, www.eeoc.gov/policy/docs/threshold.html (last visited Oct. 27, 2015).

The Commission recognized the value of conforming the limitations periods for both kinds of discharges in a 2001 amicus brief. See EEOC Amicus Br., *Bailey* v. *United Airlines*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245 (filed Mar. 26, 2001) (EEOC *Bailey* Br.). The amicus suggests that the EEOC's position is not entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), because the brief did not "reflect[] the EEOC's considered views" about

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[6] While we disagree, as a factual matter, with petitioner about *when* he gave notice of his decision to retire, petitioner agrees that such notice is the trigger. See Pet. Br. 32.

constructive discharges. Amicus Br. 26 n.9. It is true that the facts of *Bailey* v. *United Airlines*, 279 F.3d 194 (3d Cir. 2002), did not involve a constructive discharge, because the employee there chose not to resign and was ultimately terminated. *Id.* at 197. But the EEOC's explanation of what should happen in a case of constructive discharge was nonetheless fully "considered." Amicus participation in that private litigation had to be approved by the Commission itself.[7] And the brief's specific conclusion about constructive-discharge cases—*i.e.*, that "the limitations period on a claim of constructive discharge begins to run when the employee 'effectively communicate[s] her intention to resign,'" EEOC *Bailey* Br. at *9 (quoting *Flaherty* v. *Metromail Corp.*, 235 F.3d 133, 139 (2d Cir. 2000))—was integral to its reasoning about what rule should apply to Bailey's termination. The Commission concluded it would "make[] no sense" to allow the constructively discharged employee (the one who "accept[s] the resignation option") to have "a full 300 days from [the resignation] date to file a charge, while a person [like Bailey] who rejects the resignation option is limited to 300 days from the [earlier] date on which the resignation/termination option is tendered." *Id.* at *10. Its solution was to use the date of definitive notice, whether from the employer or the employee, in both the case of termination and that of resignation.[8]

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[7] See EEOC, *National Enforcement Plan*, Part V.D, www.eeoc.gov/eeoc/plan/nep.cfm (last visited Oct. 27, 2015).

[8] The Third Circuit acknowledged but did not address the EEOC's argument, because it concluded that the employee had forfeited the argument and that summary judgment in favor of the employer had been erroneous even under the argument that the employee had preserved. *Bailey*, 279 F.3d at 202.

The amicus further contends (Br. 26 n.9) that the *Bailey* brief "conflict[s]" with the EEOC's other observations that the period for initiating a complaint "begin[s] to run at the time of the unlawful event or practice." But the cited statements simply said that the period begins with "the discriminatory event" (57 Fed. Reg. 12,635 (Apr. 10, 1992)) or with the date when a party receives unequivocal notice of a "discrete act" (EEOC Compliance Manual, *Threshold Issues* § 2-IV C.1.a). They did not indicate whether the relevant "act" or "event" in a constructive-discharge case should be the employer's precipitating conduct or the employee's notice of resignation. The Management Directive discussed above—which addresses application of the regulation governing federal-sector administrative proceedings that the Commission has promulgated under 42 U.S.C. 2000e–16(b)—shows that the Commission is comfortable with characterizing an employee's resignation as a "discriminatory" event in the constructive-discharge context. See note 4, *supra*. There is accordingly no conflict between the *Bailey* brief and the EEOC's other statements.

The Commission, in short, has concluded that valuable consistency would be achieved by equating the date that an employer gives unequivocal notice of a termination with the date that an employee gives notice of a resignation. That is the same congruity sought by the parties here. See Pet. Br. 31; Resp. Br. 22-23.[9] There is no impediment to recognizing the persuasive force of that long-standing EEOC position.

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[9] The same rule was also applied in another agency decision that the amicus cites (Br. 29 n.11) for a different proposition. See *Cabello* v. *Casellas*, EEOC Appeal No. 01951093, 1996 WL 159158, at *3-*4 (E.E.O.C. Mar. 28, 1996) (holding that "the time limit for

B. Statute-of-Limitations Principles And Title VII Policy Considerations Support The Notice-Of-Resignation Rule

1. The amicus does not dispute "the standard rule that [a] limitations period commences" when "the plaintiff can file suit and obtain relief." Resp. Br. 17 (citations omitted). She nevertheless contends (Br. 29-33) that that rule has been displaced here by the particular wording of the regulation, which speaks of the period "within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. 1614.105(a)(1). As explained above, however, the EEOC manifestly disagrees with the amicus' contention that a resignation cannot be the "discriminatory" matter, and the EEOC's view is consistent with the definition of *constructive*, which indicates that the employee's own act is being imputed to the employer in the context of a constructive-discharge claim.

Because the amicus' interpretation is simply wrong, this is not a case in which the regulation's plain text compels a departure from the general rule that prevents a limitations period from beginning before the plaintiff can even allege that a constructive discharge has occurred. That suffices to distinguish the textual commands in the cases discussed by the amicus (Br. 30-31). See *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 611 (2013); *Dodd* v. *United States*, 545 U.S. 353, 358-359 (2005); *Pillsbury* v. *Unit-*

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contacting an EEO Counselor [for incidents of harassment culminating in an alleged constructive discharge] was triggered with appellant's resignation," not by the "preceding incidents of harassment").

ed Eng'g Co., 342 U.S. 197, 199-200 (1952); *McMahon* v. *United States*, 342 U.S. 25, 27 (1951).[10]

2. The notice-of-resignation rule is also consistent with how the Court has described the operation of limitations principles in the Title VII context. Title VII's comparatively short deadlines seek to "guarantee[] the protection of the civil rights laws to those who promptly assert their rights" while "also protect[ing] employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-257; accord *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630 (2007).

As explained in our opening brief (Resp. Br. 28-29), a constructive-discharge claim is inherently self-limiting in a way that protects employers from the proliferation of stale claims. Such a claim requires an employee to prove that the employer's actions created "unendurable working conditions" that would "compel[]" a reasonable person to resign, *Suders*, 542 U.S. at 141—something that becomes less plausible the longer the employee waits before resigning. As a

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[10] Similarly, although the amicus correctly notes (Br. 33) that the limitations period here is a condition on Congress's waiver of the federal government's sovereign immunity, a reasonable construction of the regulation is consistent with the notice-of-resignation rule, which does not "expand the time limits beyond what the EEOC has set." Pet. App. 22a. In any event, an unduly strict construction would be particularly inappropriate where the agency with authority to prescribe the deadlines associated with the federal-sector EEO complaint process (see 42 U.S.C. 2000e–16(b)) has specified that the 45-day period is subject to waiver, estoppel, equitable tolling, and extension for various reasons, including any "reasons considered sufficient by the [employer] agency or the Commission," 29 C.F.R. 1614.105(a)(2), 1614.604(c). Cf. *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

result, even under the notice-of-resignation rule, an employee cannot simply extend the limitations period indefinitely by delaying his resignation. See Resp. Br. 28-29 (citing cases in which delays of five, six, seven, and eight months were fatal).

3. More general Title VII policy concerns are also better served by the notice-of-resignation rule than by the court of appeals' approach.

a. The two-step process contemplated by the court of appeals—in which an employee is encouraged to file an effectively inchoate complaint and later amend it in the event of a resignation—is likely to multiply claims and be needlessly cumbersome in light of Congress's expectation that Title VII's initial procedural hurdles would be navigated by "lay complainant[s]." *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 115 (2002); see Resp. Br. 30-31; note 5, *supra*.

Moreover, the complaint-amendment process could have the counter-intuitive effect of giving the employee *more* time to inform the employer that his "resignation is not the typical kind daily occurring in the work force." *Suders*, 542 U.S. at 148. Under the notice-of-resignation rule urged by petitioner and respondent, the employee would have to complain within 45 days of giving notice. But if the employee already has a pending complaint based on conduct that had not yet risen to the level of causing a resignation when the complaint was filed, and he subsequently resigns, then he will be permitted to amend the complaint "at any time prior to the conclusion of the [agency's] investigation," which may take *up to "180 days"* after the "filing of the complaint" or even longer if "the parties agree in writing to extend the time period." 29 C.F.R. 1614.106(d) and (e)(2) (emphasis added).

b. Nor is the notice-of-resignation rule likely to have adverse effects on the possibility of resolving disputes at the pre-complaint counseling stage.[11] The amicus' contrary argument (Br. 38-40) apparently assumes that informal efforts at resolution will not work if they do not begin until the employee has already decided to resign. As she puts it (Br. 38), "informal resolution may still be possible" when the employee can "remain employed." But that is misguided for several reasons.

First, the notice-of-resignation rule does not turn on the employee's actual departure date; instead, the discharge claim ripens when the employee gives notice of his decision to resign, even if that resignation will take place at a later date. See Resp. Br. 20-22. Second, there may be room for voluntary settlement even after the employment relationship has ended. Otherwise, actual termination claims would be exempt from informal counseling. Third, the amicus suggests (Br. 39) that settlement will be "all but impossible" if an employee has weighed the higher stakes and already decided to resign. But that implicitly assumes that flexibility should come only from the employee. It is equally possible that the *employer* will have more reason to compromise once it is made aware that the allegations rise to the level of a constructive discharge.

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[11] Pre-complaint counseling occurs only in the federal sector; it permits an EEO counselor within the agency to "conduct a limited inquiry" and to "facilitate resolution" but not to "develop[] or advocate specific terms of an agreement." *EEO-MD-110*, at 2-12, 2-14. What is generally known as the "conciliation process" applies to complaints against non-federal respondents. See *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1649-1650 (2015). It contemplates more active "endeavor[s]" by the EEOC to promote relief it deems appropriate. 42 U.S.C. 2000e–5(b).

Fourth, to the extent that the pendency of a complaint leads the parties' positions to "harden[]," Amicus Br. 38 (quoting 57 Fed. Reg. at 12,635), that would also suggest there is some danger in the court of appeals' approach of forcing an employee to complain about allegedly discriminatory conduct even before he has had the chance to determine whether it is sufficiently severe to warrant resignation.

4. Finally, the Court should take some comfort from experience. Between 1987 and 2000, five courts of appeals adopted the notice-of-resignation rule in the constructive-discharge context. Resp. Br. 21 n.9.[12] And the Department of Labor has adopted a similar approach when evaluating retaliatory constructive discharges under whistleblower-protection statutes. See *id.* at 31-32. As we noted in our opening brief (*id.* at 31 & n.12), and as the amicus also concludes (Br. 44), the question of how to handle the limitations period associated with a constructive discharge does not appear to have frequently arisen. But, notwithstanding five circuits' use of a notice-of-resignation rule for 15 to 28 years, no one suggests any evidence of proliferation in the use of constructive-discharge claims to revive otherwise-stale discrimination claims.

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[12] The amicus quotes one of those decisions for the purportedly contrary proposition that "administrative deadlines run from the time of the discriminatory act." Amicus Br. 43 (quoting *Young* v. *National Ctr. for Health Servs. Research*, 828 F.2d 235, 237 (4th Cir. 1987)). But *Young* rejected an employer's attempt to invoke *Ricks* in the constructive-discharge context and expressly held that, when a resignation is "a constructive discharge," it is not "merely the consequence of past discrimination" but "a *distinct discriminatory 'act'* for which there is a distinct cause of action." 828 F.2d at 237-238 (emphasis added).

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For the foregoing reasons and those stated in our opening brief, the Court should not adopt the rationale of the court of appeals' decision. But, for the reasons stated at pages 32-39 of our opening brief, the Court should affirm the judgment of the court of appeals.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2015

No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR COURT-APPOINTED AMICA CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether the period in 29 C.F.R. § 1614.105(a)(1) for a federal employee to initiate pre-complaint counseling on a constructive-discharge claim under Title VII begins to run when the employee resigns or at the time of the employer's last discriminatory act giving rise to the resignation.

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CTS Corp. v. *Waldburger*, 134 S. Ct. 2175 (2014) 36

Delaware State College v. *Ricks* 449 U.S. 250 (1980) ..... *passim*

TABLE OF AUTHORITIES—Continued

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Douchette v. *Bethel School District No. 403*, 818 P.2d 1362 (Wash. 1991) 35

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EEOC v. *L.B. Foster Co.*, 123 F.3d 746 (3d Cir. 1997) 39

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Gabelli v. *SEC*, 133 S. Ct. 1216 (2013) 33

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Hancock v. *Bureau of National Affairs, Inc.*, 645 A.2d 588 (D.C. 1994) 35

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Hebert v. *Mohawk Rubber Co.*, 872 F.2d 1104 (1st Cir. 1989) 41, 42

Heimeshoff v. *Hartford Life & Accident Insurance Co.*, 134 S. Ct. 604 (2013) 15, 29, 30, 31, 36, 45

Hernandez-Torres v. *Intercontinental Trading, Inc.*, 158 F.3d 43 (1st Cir. 1998) 19

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Ledbetter v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute on other grounds*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 25

Mac's Shell Service Inc. v. *Shell Oil Products Co.*, 559 U.S. 175 (2010) 34

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National Railroad Passenger Corp. v. *Notter*, 677 F. Supp. 1 (D.D.C. 1987) 36

O'Brien v. *USDA*, 532 F.3d 805 (8th Cir. 2008) 19

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Pollard v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) 17

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Rawlings v. *Ray*, 312 U.S. 96 (1941) 30

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Stupek v. *Wyle Laboratories Corp.*, 963 P.2d 678 (Or. 1998) 35

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Taylor v. *Solis*, 571 F.3d 1313 (D.C. Cir. 2009) 3

TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 30

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United Air Lines, Inc. v. *Evans*, 431 U.S. 553 (1977) 24, 25, 27

United States v. *Kubrick*, 444 U.S. 111 (1979) 33

W.R. Grace & Co. v. *Local Union 759*, 461 U.S. 757 (1983) 38

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Cabello v. *Casellas*, 1996 WL 159158 (Office of Fed. Ops. Mar. 28, 1996) 29

TABLE OF AUTHORITIES—Continued

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Cochran v. *Reno*, 1996 WL 705504 (Office of Fed. Ops. Nov. 27, 1996) 45

Complainant v. *McHugh*, 2014 WL 6853728 (Office of Fed. Ops. Nov. 25, 2014) 7

Gorski v. *Henderson*, 2000 WL 1687230 (Office of Fed. Ops. Oct. 31, 2000) 7

Wallace v. *Donley*, 2010 WL 3314272 (Office of Fed. Ops. Aug. 12, 2010) 42

Zayas v. *Shinseki*, 2012 WL 258370 (Office of Fed. Ops. Jan. 20, 2012) 29

34 Fed. Reg. 5,367 (Mar. 19, 1969) 4, 5

37 Fed. Reg. 22,717 (Oct. 21, 1972) 5

54 Fed. Reg. 45,747 (Oct. 31, 1989) 5

57 Fed. Reg. 12,634 (Apr. 10, 1992) 4, 5, 26, 28, 37, 38, 45

80 Fed. Reg. 6,669 (Feb. 6, 2015) 3, 4, 8

Exec. Order No. 11478, 34 Fed. Reg. 12,985 (Aug. 12, 1969) 4

EEOC, *Annual Report on the Federal Work Force Part I: Fiscal Year 2012*, *available at* http://www.eeoc.gov/federal/reports/fsp2012/upload/FY-2012-Annual-Report-Part-I-Complete.pdf (last visited Sept. 28, 2015) 40

TABLE OF AUTHORITIES—Continued

Page(s)

EEOC, *After You Have Filed a Charge, available at* http://www.eeoc.gov/employees/afterfiling.cfm (last visited Sept. 28, 2015) 41

EEOC, *Compliance Manual: Threshold Issues, available at* http://www.eeoc.gov/policy/docs/threshold.html (last visited Sept. 28, 2015) 26, 28

EEOC, *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614* (rev. Nov. 9, 1999) 7, 41

EEOC, *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614* (rev. Aug. 5, 2015) 3, 4, 7, 8, 38, 40, 41

Regulations.gov, *Federal Sector Equal Employment Opportunity, available at* http://www.regulations.gov/#!docketDetail;D=EEOC-2015-0005 (last visited Sept. 28, 2015 8

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§ 1614.407 8
§ 1614.604(c) 6, 45

D.C. Code § 12-301 36

Iowa Code § 2740.4 (1872) 30

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OTHER AUTHORITIES

Corman, Calvin W., *Limitations of Actions* (1991) 30, 37

Friedman, Andrew H., *Litigating Employment Discrimination Cases* (rev. Aug. 2012) 3

Larson, Lex K., *Labor & Employment Law* (2015) 18

Lindemann, Barbara T., et al., *Employment Discrimination Law* (5th ed. 2012) 18, 19

Shuck, Cathy, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 Berkeley J. Emp. & Lab. Law 401 (2002) 19, 42

IN THE

Supreme Court of the United States

No. 14-613

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR COURT-APPOINTED AMICA CURIAE IN SUPPORT OF THE JUDGMENT BELOW

INTRODUCTION

To exhaust a claim of employment discrimination under Title VII, a federal employee must first consult an equal employment opportunity counselor in his or her agency. This requirement aims to promote early, informal resolution of disputes before the parties' positions have hardened. To that end, employees must satisfy strict time limits for initiating informal counseling. As relevant here, a federal employee must contact a counselor "within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1).

Marvin Green, a former employee of the U.S. Postal Service, filed suit alleging that he was forced to retire in retaliation for having pursued charges of discrimination. The question presented is whether Green had to initiate informal counseling on that claim within 45 days of his resignation or 45 days of the last discriminatory act of his employer that led to his resignation.

Green and the government would answer that question by applying a general rule that limitations periods often commence when the cause of action accrues. But the principal lesson of this Court's statute-of-limitations cases is simply that the clock starts ticking when the limitations provision says it does. And in a constructive-discharge case, the "matter alleged to be discriminatory" is the underlying discriminatory act of the employer—not the employee's resignation.

The constructive-discharge doctrine protects an employee's access to the full range of remedies for unlawful discrimination when intolerable conditions force him or her to resign; it does not alter the usual structure of a Title VII claim as challenging the discriminatory conduct of the employer. A resignation is "functionally the same as an actual termination in *damages-enhancing respects*," *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 148 (2004) (emphasis added), but nothing in this Court's precedent or the limitations provision supports "the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer" for statute-of-limitations purposes, Pet. App. 20a. Moreover, tying the limitations period to the date of resignation, as Green and the government advocate, would frustrate the purpose of the counseling requirement by delaying informal counseling until after the employee's commitment to resign has passed the point of no return.

STATEMENT

A. Legal Background

As amended in 1972, Title VII of the Civil Rights Act of 1964 requires that "[a]ll personnel actions affecting employees or applicants for employment" within certain entities of the federal government "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Although Title VII includes no express anti-retaliation provision applicable to federal employers, courts have construed Title VII's anti-discrimination rule to prohibit retaliation by federal employers against employees or job applicants who oppose practices that Title VII forbids or who pursue charges of discrimination. *See, e.g.*, *Taylor* v. *Solis*, 571 F.3d 1313, 1320 (D.C. Cir. 2009); *see also* 29 C.F.R. § 1614.101(b) ("[n]o person shall be subject to retaliation"); 42 U.S.C. § 2000e-3(a) (private-sector anti-retaliation provision).[1]

Before suing to challenge alleged discrimination, federal employees must first exhaust administrative remedies as provided in 29 C.F.R. part 1614. *See* 42 U.S.C. § 2000e-16(c). Exhaustion procedures in the federal sector are "significantly more onerous" than in the private sector. 1 Friedman, *Litigating Employment Discrimination Cases* § 1:57.8 (rev. Aug. 2012). Whereas private-sector employees exhaust claims by filing a formal charge of discrimination with the Equal

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[1] Before Congress extended Title VII to the federal sector in 1972, discrimination in federal employment was addressed by a series of executive orders going back to the 1940s and, beginning in 1966, administrative regulations then codified at 5 C.F.R. part 713. *See* 80 Fed. Reg. 6,669, 6,669-6,670 (Feb. 6, 2015); EEOC, *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614*, at P-i to P-iv (rev. Aug. 5, 2015).

Employment Opportunity Commission ("EEOC"), 42 U.S.C. §§ 2000e-5(e), 2000e-16c(b)(1), federal employees must first initiate informal counseling with an equal employment opportunity ("EEO") counselor at the agency accused of discrimination, 29 C.F.R. § 1614.105(a), and then file a formal administrative complaint with the agency before an optional appeal to the EEOC from the agency's final decision. 80 Fed. Reg. 6,669, 6,670 (Feb. 6, 2015). Satisfaction of these "'rigorous administrative exhaustion requirements and [corresponding] time limits'" is a "condition[] [of] the government's waiver of sovereign immunity" in employment-discrimination cases. *McFarland* v. *Henderson*, 307 F.3d 402, 406 (6th Cir. 2002) (quoting *Brown* v. *GSA*, 425 U.S. 820, 833 (1976)); *see also Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 94 (1990) ("§ 2000e-16(c) is a condition to the waiver of sovereign immunity and thus must be strictly construed").

The federal-sector threshold requirement of pre-complaint counseling has no analogue in the private sector. *See* 57 Fed. Reg. 12,634, 12,634-12,635 (Apr. 10, 1992).[2] Pre-complaint counseling "encourag[es] the resolution of employee problems on an informal basis." Exec. Order No. 11478 § 4, 34 Fed. Reg. 12,985, 12,986 (Aug. 12, 1969). The agency's EEO counselor advises the employee of his or her rights and responsibilities, 29 C.F.R. § 1614.105(b)(1), gathers basic information, and "attempts to informally resolve the matter(s)," EEOC, *Equal Employment Opportunity Management*

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[2] Pre-complaint counseling in the federal sector was first required by regulation in 1969, before Title VII was extended to federal employment. 80 Fed. Reg. at 6,670; *see* 34 Fed. Reg. 5,367, 5,369 (Mar. 19, 1969).

Directive for 29 C.F.R. Part 1614, at 2-1 (rev. Aug. 5, 2015) ("EEO-MD-110").

Recognizing that "the earliest possible contact with a counselor aids resolution of disputes because positions on both sides have not yet hardened," 57 Fed. Reg. at 12,634-12,635, the EEOC has established strict time limits for federal employees to initiate pre-complaint counseling. The time limit was originally set at 15 days, *see* 34 Fed. Reg. 5,367, 5,369 (Mar. 19, 2969), and soon extended to 30, *see* 37 Fed. Reg. 22,717, 22,719 (Oct. 21, 1972). In 1989, the EEOC invited comment on whether the time period should be lengthened. 54 Fed. Reg. 45,747, 45,749 (Oct. 31, 1989). Some commenters advocated for a "symmetry between" the federal-sector deadline for contacting a counselor and the private-sector deadline for filing a charge with the EEOC—either 180 or 300 days from the time of the unlawful employment practice, depending on whether the employee initially institutes qualified state proceedings, 42 U.S.C. § 2000e-5(e)(1). *See* 57 Fed. Reg. at 12,634. According to those commenters, "30 days was insufficient to reflect, secure advice or realize the impact of a discriminatory action," and "the relatively short period was screening out many meritorious complaints." *Id.*

The EEOC rejected that proposal, concluding that "the analogy between the private sector filing period and the federal sector counseling time limit" was not "apt" in light of the unique role of pre-complaint counseling in the federal employment context. 57 Fed. Reg. at 12,634. The EEOC therefore set the time limit at 45 days, where it has remained. *Id.* at 12,635. A federal employee alleging employment discrimination must accordingly

> initiate contact with a[n EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

29 C.F.R. § 1614.105(a)(1).

Courts have construed this provision to "function[] like a statute of limitations," under which an employee's failure to contact an EEO counselor within 45 days bars any later suit. *Ramirez* v. *Secretary, Dep't of Transp.*, 686 F.3d 1239, 1243 (11th Cir. 2012); *see* Pet. Br. 4-5; U.S. Br. 16-17; *cf. Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 392-395 (1982) (construing private-sector time limit for filing EEOC charge). The employee's agency or the EEOC "shall" extend this time limit, however, when the employee shows

> that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been [sic] known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the [EEOC].

29 C.F.R. § 1614.105(a)(2). And this deadline is "subject to waiver, estoppel and equitable tolling." *Id.* § 1614.604(c).

Unless the employee agrees to a longer time, the EEO counselor must complete a final interview within 30 days after the employee initiates pre-complaint counseling. 29 C.F.R. § 1614.105(d). If counseling does

not resolve the matter, the employee may file a formal administrative complaint with the agency accused of discrimination within "15 days of receipt" from the EEO counselor of a written notice of the right to proceed. *Id.* § 1614.106(b). The filing of the administrative complaint triggers the agency's obligation to "conduct an impartial and appropriate investigation ... within 180 days of the filing," unless the parties agree to extend that time. *Id.* § 1614.106(e)(2). Upon completion of the agency's investigation, the employee may "request a hearing and decision from an administrative judge or may request an immediate final decision ... from the agency." *Id.* § 1614.108(f).

At any time while an administrative complaint is pending, the employee may amend it to include "like or related" "issues or claims." 29 C.F.R. § 1614.106(d).[3] The employee need not seek counseling separately on such claims. *See* 29 C.F.R. § 1614.107(a)(2); EEO-MD-110, at 5-10 (citing *Braxton* v. *Potter*, 2010 WL 4388483, at *2 (Office of Fed. Ops. Oct. 29, 2010)); *Gorski* v. *Henderson*, 2000 WL 1687230, at *2 (Office of Fed. Ops. Oct. 31, 2000); EEOC, *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614*, at 5-9 (rev. Nov. 9, 1999).

If the agency's final decision is adverse to the employee, the employee may file an optional appeal with the EEOC within 30 days after receipt of the agency's

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[3] "A later claim ... is 'like or related' to the original complaint if the later claim ... adds to or clarifies the original complaint and/or could have reasonably been expected to grow out of the original complaint during the investigation." *Complainant* v. *McHugh*, 2014 WL 6853728, at *2 (Office of Fed. Ops. Nov. 25, 2014); *see also* EEO-MD-110, at 5-12 (discussing amendment of complaint to add constructive-discharge claim).

decision. 29 C.F.R. §§ 1614.401(a), 1614.402. Alternatively, the employee may file a civil action within 90 days of receipt of the agency's final decision. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407.[4]

On February 6, 2015, the EEOC issued an advance notice of proposed rulemaking "to consider how the Commission's federal sector complaint process currently works and whether wholesale revisions to the process are needed." EEO-MD-110, at P-vii to P-viii; *see* 80 Fed. Reg. at 6,669-6,671. Among other things, the EEOC sought comments on "[h]ow many days ... a complainant [should] have to contact a counselor from the date of the alleged discriminatory matter." 80 Fed. Reg. at 6,671. The comment period ended in April 2015. The EEOC has said it "intends to issue a [notice of proposed rulemaking] to amend the [part] 1614 regulations," EEO-MD-110, at P-viii, but has not yet done so. *See* Regulations.gov, *Federal Sector Equal Employment Opportunity* (last visited Sept. 28, 2015).

B. Green's Claim

Petitioner Marvin Green, an African-American man, was a long-time employee of the U.S. Postal Service. In 2008, while serving as postmaster in Englewood, Colorado, Green applied for a promotion to a higher-level postmaster position in Boulder, Colorado. Pet. App. 3a, 29a. His supervisor, Gregory Christ, se-

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[4] The employee may file suit 180 days after the filing of the administrative complaint if the agency has failed to take final action. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407. If the employee appeals to the EEOC, any subsequent lawsuit must be filed within 90 days after receipt of the EEOC's decision, but may be filed 180 days after the filing of the appeal if the EEOC fails to issue a decision. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407.

lected someone else for the job. Pet. App. 3a. Believing that he had been denied promotion because of his race, Green contacted a Postal Service EEO counselor in July 2008 and later filed a formal administrative complaint. *Id.*

According to Green, Christ and Charmaine Ehrenshaft, a Postal Service manager of labor relations, began bullying and harassing him while he pursued his administrative complaint. Pet. App. 3a; JA12-14. Green initially sought to address the situation with the help of a representative from the National League of Postmasters. JA12-14. When that did not resolve the matter to Green's satisfaction, Green initiated a second EEO proceeding by contacting the Postal Service EEO counselor in May 2009, alleging that the threats and harassment constituted unlawful retaliation for his 2008 EEO activity. Pet. App. 3a; JA14. Green did not proceed with an administrative complaint at that time.

While Green's second EEO proceeding was pending, Ehrenshaft and her supervisor, David Knight, received a congressional inquiry related to Green's conduct as Englewood postmaster. Pet. App. 30a-31a. The inquiry concerned complaints by the National Letter Carriers' Union that Green had failed to comply with employee grievance procedures and had intentionally delayed mail relating to those grievances. *Id.* Ehrenshaft instructed Green to appear for an investigative interview about the allegations. Pet. App. 30a.

On December 11, 2009, Ehrenshaft and Knight conducted the investigative interview. Pet. App. 4a. Green was represented at the interview by Robert

Podio of the National Association of Postmasters. *Id.*[5] Knight and Ehrenshaft interviewed Green about the alleged mishandling of employee grievances and delay of the mail. *Id.* Knight also asked Green about certain allegations another Postal Service employee had raised concerning Green's conduct. Pet. App. 31a. When that interview ended, two agents from the Postal Service Office of the Inspector General ("OIG") questioned Green further about the allegation that he had intentionally delayed the mail—a potential felony. *Id.*; Pet. App. 4a-5a; JA16-17. After the OIG interview, Knight and Ehrenshaft informed Green that he had been placed on immediate off-duty status under the Postal Service's emergency-placement policy. Pet. App. 5a; C.A. App. 600.

The next day, Podio reached out to Knight to seek a resolution. Pet. App. 5a. Podio proposed that he would try to "get [Green] to retire" if Knight would forgo any charges against him. JA54. Knight agreed, *id.*, and the negotiations proceeded, Pet. App. 32a. On December 15, 2009, Podio forwarded to Green a proposed settlement agreement. *Id.*

The settlement agreement provided that Green would "immediately relinquish" his Englewood postmaster position and would "be assigned and accept placement to" a lower-level position in Wamsutter, Wyoming. JA60; *see also* Pet. App. 5a. Green would continue receiving the salary associated with his Englewood position until March 30, 2010, and would be allowed to take various forms of leave through March 31, 2010. JA60. The agreement further provided that

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[5] Green had also retained an attorney, who did not attend the interview. *See* C.A. App. 383, 783.

Green "agree[d] to retire from the Postal Service no later than March 31, 2010." *Id.* If Green's "retirement from the Postal Service d[id] not occur," Green would "report for duty" in the Wamsutter position on April 1, 2010, and would be paid at the lower salary associated with the new position. JA61. In exchange, the Postal Service "agree[d] that no charges w[ould] be pursued based on the items reviewed during" the December 11 investigative interview. JA60.

On December 16, 2009, Green, Podio, and Knight signed the agreement. JA61. Green submitted retirement papers on February 9, 2010, and his retirement became effective on March 31, 2010. Pet. App. 6a, 32a.

On March 22, 2010, Green—who continued to be represented by counsel, JA66—contacted the Postal Service's EEO office concerning a claim of constructive discharge. Pet. App. 6a.[6] Green alleged that he had been "forced [to] retire[]" in retaliation "for engaging in Title VII protected activity." JA64 (capitalization altered); *see also* JA67. On April 23, 2010, Green filed a formal administrative complaint addressing that issue, alleging that the Postal Service had "forced [him] out of [his] job" in retaliation for filing charges of discrimina-

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[6] Green had separately sought EEO counseling on January 7, 2010, concerning events on or before December 11, 2009, including his removal from the Englewood postmaster position and emergency placement on off-duty status. Pet. App. 6a. That proceeding did not address the December 16, 2009 settlement or Green's forced retirement. Once the EEO counselor had processed that informal complaint, Green filed a formal administrative complaint in February 2010 challenging his removal from the Englewood position, the emergency placement, and four retaliatory actions that allegedly took place in 2009. *Id.* The Postal Service dismissed Green's complaint, and the EEOC affirmed. *Id.*

tion. Ex. A, Att. 20 to Def.'s Mot. for Summ. J., Dkt. No. 90-21 (D. Colo. Nov. 12, 2012).[7]

On August 5, 2010, the Postal Service issued a final decision dismissing Green's complaint. JA22-46. The Postal Service concluded that Green failed to state a claim because he voluntarily accepted the benefits of the December 16, 2009 settlement and chose to retire. JA23-24. In the alternative, the Postal Service found that no discrimination had occurred. Green failed to make a prima facie case of retaliation because "[h]is retirement was ... his own choice and decision," JA35, and there was insufficient temporal proximity between Green's EEO activity and the settlement to raise any inference of retaliation, JA36. Although Green had alleged that he was bullied, harassed, and insulted, he "provided no evidence or testimony to support [those] allegations, no witnesses, and no copies of the emails with which he was allegedly 'bombarded.'" JA38. The Postal Service also found legitimate, nondiscriminatory explanations for Knight and Ehrenshaft's actions, noting that the investigative interview was precipitated by a congressional inquiry and other complaints about Green's conduct and that there was no evidence of pretext. JA40-44. Green did not appeal to the EEOC.

C. Proceedings Below

On September 8, 2010, Green filed this lawsuit. As relevant here, Green's amended complaint alleged that the Postal Service "forc[ed] him to retire" in retaliation for his protected Title VII activity. JA20. Green supported that claim with allegations of "harassment, bul-

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[7] Although Green's complaint made other allegations, Green's counsel clarified that "'the only issue'" presented was "'the constructive discharge claim.'" Pet. App. 6a.

lying, insults, humiliation, and unjustified disciplinary actions" occurring between August 2008 and December 16, 2009. JA12-20. The amended complaint alleged no facts post-dating the December 16, 2009 settlement, except for the signing and effective date of Green's retirement papers and the filing of Green's administrative complaint. JA8-21.

The Postal Service moved for summary judgment on the constructive-discharge claim, arguing among other things that Green had not properly exhausted the claim because he failed to make timely contact with the EEO counselor under 29 C.F.R. § 1614.105(a)(1). C.A. App. 401-404. The Postal Service argued that the 45-day deadline began to run when "the employee ha[d] notice of the discriminatory acts, not the time at which the consequences of the acts became most painful." C.A. App. 402 (internal quotation marks omitted). Because "[e]ach of the retaliatory acts [Green] allege[d] occurred on or before December 16, 2009, when he signed the settlement agreement in which he agreed to retire," the Postal Service argued that Green's constructive-discharge claim "accrued on December 16, 2009, more than 45 days before he contacted the EEO counselor on March 22, 2010." C.A. App. 403-404.

The district court granted the Postal Service's motion and dismissed the constructive-discharge claim. Pet. App. 28a. The court agreed with the Postal Service that the 45-day time limit on a constructive-discharge claim began to run at the time of the employer's discriminatory act, just as in other discrimination claims. Pet. App. 36a-37a. Because "[t]here [wa]s no dispute" that all of the allegedly retaliatory acts in this case "occurred on or before December 16, 2009"—and because Green "d[id] not argue waiver, estoppel, or equitable tolling" or contend that he lacked notice of the

alleged discriminatory acts—Green's EEO contact on March 22, 2010 was too late. Pet. App. 37a-38a.

The U.S. Court of Appeals for the Tenth Circuit affirmed in relevant part. Pet. App. 15a-23a. The court held that "the start of the limitations period for constructive-discharge claims is the same as for other claims of discrimination," running from the last alleged discriminatory act of the employer. Pet. App. 16a. The court explained that the chief function of the constructive-discharge doctrine is to expand the remedies available to an employee who reasonably resigns because of intolerable working conditions. Pet. App. 16a-17a, 21a. While "'a constructive discharge is functionally the same as an actual termination in *damages-enhancing respects*,'" the court reasoned, "[i]t does not follow ... that it should be treated as the functional equivalent for purposes of the limitations period." Pet. App. 21a. The court "c[ould] not endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer," particularly where doing so would "allow[] the employee to extend the date of accrual indefinitely." Pet. App. 20a, 21a.

SUMMARY OF ARGUMENT

A federal employee must initiate pre-complaint counseling on a constructive-discharge claim within 45 days after the employer's last discriminatory act giving rise to the employee's resignation. Green's EEO contact, some three months after the last alleged act of discrimination, was too late.

I. A constructive-discharge claim entails both predicate discrimination by the employer that is independently actionable and working conditions "so intolerable that a reasonable person would have felt com-

pelled to resign." *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 147 (2004). The intolerable conditions make the employee's decision to resign reasonable, thereby preserving remedies that otherwise would be unavailable to an employee who quits his job. *See id.* at 148 (resignation is "functionally the same as an actual termination in damages-enhancing respects"). But it is the employer's predicate discrimination that is the target of the employee's claim—the "matter alleged to be discriminatory"—without which the claim fails. The regulation's requirement that the employee initiate pre-complaint counseling within 45 days of the "matter alleged to be discriminatory" is thus tethered to the employer's discriminatory conduct—not the employee's decision to resign.

The last-discriminatory-act rule accords with this Court's precedent applying limitations periods in other discrimination cases. The "'proper focus'" in such cases "'is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.'" *E.g.*, *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 258 (1980). In a constructive-discharge case, the employee's resignation is a consequence of the employer's discriminatory conduct, and the proper focus is therefore on the underlying discriminatory acts.

II. Green and the government contend that this straightforward approach clashes with a "general rule" that limitations periods start running when a claim accrues. "[S]tatutes of limitations," however, "do not inexorably commence upon accrual." *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013). When they do not, courts apply them according to their text—even when that means the limitations period starts before the cause of action accrues. To determine when the limitations period in 29 C.F.R.

§ 1614.105(a)(1) begins to run in this case, the Court must therefore identify the "matter" that Green "alleg[s] to be discriminatory"—not the moment when he had a complete and present cause of action.

III. The last-discriminatory-act rule promotes informal conciliation—a paramount objective of Title VII and the very purpose of the regulation at issue here—by requiring that an employee initiate counseling promptly, when informal resolution may still be possible. Far from "straining" workplace relationships, as Green predicts, the last-discriminatory-act rule encourages resolution of claims before those relationships have been severed. Delaying counseling until after an employee has resigned, as Green and the government advocate, would frustrate that goal.

Although Green contends that the date-of-resignation rule is easier to apply, his dispute with the government over how to apply that rule in this case suggests otherwise. In any event, applying the last-discriminatory-act rule in a constructive-discharge case requires courts to make precisely the same determinations they routinely make in assessing the timeliness of other kinds of discrimination claims. Green offers no reason to think that those inquiries will be more burdensome in this context.

Nor does the last-discriminatory-act rule work any unfairness to diligent claimants. Safety valves in the regulation require extension of the deadline or application of equitable doctrines in cases where the employee lacked notice of the deadlines, where the employer lulled the employee into delaying too long, or where other circumstances warrant relief from the limitations provision. Outside of those circumstances, however, the regulation intentionally demands compliance with

rigorous time limitations to maximize the chance of early, informal resolution. Green failed to comply with those requirements.

ARGUMENT

I. THE LIMITATIONS PERIOD FOR INITIATING PRE-COMPLAINT COUNSELING ON A CONSTRUCTIVE-DISCHARGE CLAIM BEGINS AT THE TIME OF THE EMPLOYER'S LAST DISCRIMINATORY ACT

A. In A Constructive-Discharge Claim, The "Matter Alleged To Be Discriminatory" Is The Discriminatory Conduct Of The Employer Giving Rise To The Resignation

Under 29 C.F.R. § 1614.105(a)(1), as relevant here, the 45-day deadline for a federal employee to initiate pre-complaint counseling on a charge of discrimination begins to run on "the date of the matter alleged to be discriminatory." The court of appeals correctly held that the "matter alleged to be discriminatory" in a constructive-discharge claim is not the employee's decision to resign, but the underlying discriminatory act of the employer that led to the resignation.

As the court of appeals explained, the constructive-discharge doctrine serves to "expand the remedies available to an employee subjected to improper employer conduct." Pet. App. 16a. Under Title VII, courts that find unlawful discrimination may award damages and equitable remedies. 42 U.S.C. § 2000e-5(g)(1); *see Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848-853 (2001); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). Certain remedies, however—including back pay, front pay, and reinstatement—are generally available only if the employee was discharged. *See, e.g., Jurgens* v. *EEOC*, 903

F.2d 386, 389 (5th Cir. 1990); *Major* v. *Rosenberg*, 877 F.2d 694, 695 (8th Cir. 1989); Pet. App. 16a; *see also* 3 Larson, *Labor & Employment Law* § 59.05[8] (2015) ("whether a plaintiff quit voluntarily or was constructively discharged will determine whether he or she will be entitled to back pay and perhaps other remedies" (footnote omitted)). Employees have a duty to mitigate damages, and "remaining on the job" is usually encompassed within that duty. *Jurgens*, 903 F.2d at 389. "[A]n employee who quits a job after employer misconduct" is therefore ordinarily "treated as having voluntarily left the employment" and forfeits his right to those remedies. Pet. App. 16a.

The constructive-discharge doctrine recognizes that, in some cases, "unendurable working conditions" might make it reasonable for an employee to resign, and that employers should not be able to evade liability for otherwise available remedies for unlawful discrimination by forcing such a resignation. *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 141 (2004). When that occurs, the employee's reasonable decision to resign is "assimilated to a formal discharge for *remedial purposes*." *Id.* (emphasis added). As a result, the employee may resign without forfeiting the opportunity to seek back pay and front pay or reinstatement. *Id.* at 147 n.8; *see* Pet. App. 16a-17a, 21a; 1 Lindemann et al., *Employment Discrimination Law* 21-49 (5th ed. 2012) ("An employee confronted with an unsatisfactory or even discriminatory job environment is not precluded from quitting and suing for whatever legal violation may have occurred. Unless the constructive discharge test is met, however, a court cannot hold the employer responsible for the economic losses that the employee brought about by quitting.").

Although the constructive-discharge doctrine protects an employee's access to the full range of remedies when intolerable conditions force him or her to resign, it does not alter the usual anatomy of a Title VII claim as a challenge to the discriminatory conduct of the employer. To prevail on a constructive-discharge claim, the employee must show both predicate discrimination that is independently actionable and working conditions "so intolerable that a reasonable person would have felt compelled to resign." *Suders*, 542 U.S. at 147-148. The latter factor makes the employee's decision to resign reasonable, thereby preserving the full range of remedial options. *Id.* at 141. But it is the former factor—predicate discrimination by the employer—that is the target of the claim. The underlying discriminatory practice can be a discrete act (*e.g.*, a demotion or transfer) or a hostile work environment. *Id.* at 148. But "if the underlying discrimination claim fails, the constructive discharge claim necessarily fails as well." 1 Lindemann et al., *Employment Discrimination Law* 21-49; *see also, e.g.*, *O'Brien* v. *USDA*, 532 F.3d 805, 811 (8th Cir. 2008); *Bannon* v. *University of Chi.*, 503 F.3d 623, 629-630 (7th Cir. 2007); *Wells* v. *Shalala*, 228 F.3d 1137, 1146 (10th Cir. 2000); *Hernandez-Torres* v. *Intercontinental Trading, Inc.*, 158 F.3d 43, 47-48 (1st Cir. 1998); Shuck, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 Berkeley J. Emp. & Lab. Law 401, 416 (2002) ("constructive discharge claim cannot exist independently of a discrimination claim").

Contrary to the government's suggestion (at 24), this Court recognized in *Suders* that an employee's resignation in a constructive-discharge case is not imputed to the employer for all purposes:

> Unlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be. A constructive discharge involves both an employee's decision to leave and precipitating conduct: *The former involves no official action*; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action.

542 U.S. at 148 (second emphasis added). The Court treated resignation as "functionally the same as an actual termination" only "in damages-enhancing respects." *Id.* The Tenth Circuit therefore correctly refused to "endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer" for statute-of-limitations purposes. Pet. App. 20a.

In some cases, of course, the time of the employee's reasonable resignation might coincide with the time of the employer's discriminatory conduct. That might occur when the intolerable conditions precipitating an employee's decision to resign are themselves alleged discriminatory acts of the employer. In *Suders*, for example, the plaintiff was subjected to "a continuous barrage of sexual harassment that ceased only when she resigned" on the heels of a final act of harassment. 542 U.S. at 135, 136. But where an employee is subject to an allegedly discriminatory act, such as a transfer or demotion, and resigns later due to consequent intolerable circumstances that are not themselves alleged to be discriminatory—*e.g.*, if the employee's new position is in a bad location, entails longer hours, or requires menial work beneath the employee's skill set—there is a clear distinction between the employee's resignation and the underlying unlawful act of discrimination. Only

the latter "involves ... official action," *id.* at 148, and only the latter constitutes the "matter alleged to be discriminatory," 29 C.F.R. § 1614.105(a)(1). This is such a case. Green's amended complaint alleged no discriminatory conduct or events after he received and signed the settlement agreement. *Supra* pp. 12-13. Yet he waited more than three months to approach an EEO counselor about the actions Knight and Ehrenshaft took in forcing him to retire.

B. The Last-Discriminatory-Act Rule Accords With This Court's Precedent

The last-discriminatory-act rule and its application in this case conform to the approach this Court has taken in applying limitations periods in other discrimination cases. That precedent establishes that "'[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.'" *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 258 (1980). Consistent with that approach, applying the limitations period in 29 C.F.R. § 1614.105(a)(1) should focus on the employer's discriminatory acts, not on the employee's decision to resign as a consequence of those acts.

In *Ricks*, the plaintiff, a college professor, was denied tenure. In line with the college's standard procedure, Ricks was offered a one-year terminal contract, which he accepted. 449 U.S. at 252-254. More than 180 days later, Ricks filed a charge of discrimination with the EEOC claiming that he was denied tenure based on his national origin, and he later filed suit. *Id.* at 254. The court of appeals held that Ricks's EEOC complaint was timely under the private-sector limitations provision, 42 U.S.C. § 2000e-5(e), because the limitations pe-

riod did not begin to run until his terminal contract expired. *Id.* at 255.

This Court reversed. Under the limitations provision, Ricks was required to file a charge with the EEOC "'within [180] days after the alleged unlawful employment practice occurred.'" *Ricks*, 449 U.S. at 256 (quoting 42 U.S.C. § 2000e-5(e)). Applying that provision "require[d] [the Court] to identify precisely the 'unlawful employment practice' of which [Ricks] complain[ed]." *Id.* at 257. Based on the allegations of the complaint, the Court concluded that "the only alleged discrimination occurred—and the filing limitations period[] therefore commenced—at the time the tenure decision was made and communicated to Ricks." *Id.* at 258. That was so "even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* The Court rejected Ricks's argument that the limitations period ran from his last date of employment, concluding: "If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment. But the complaint alleges no such facts." *Id.* at 257.

Similarly, in this case, the only discrimination alleged in Green's amended complaint occurred when (or before) he received and signed the settlement agreement. *Supra* pp. 12-13. Green alleged no "discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment." *Ricks*, 449 U.S. at 257. His eventual resignation was an effect of the December 16, 2009 settlement, but the fact that it occurred later does not change when the alleged discriminatory event occurred.

The government claims that an employee's resignation in the constructive-discharge context "is not 'a delayed, but inevitable, consequence' of the challenged conduct, ... but rather a new, intervening act which is imputed to the employer." U.S. Br. 12 (quoting *Ricks*, 449 U.S. at 257-258); *see also* U.S. Br. 25-26. Given the government's own argument (at 32-34) that Green agreed to retire at the time of settlement, leaving no further decision to make, this contention provides no basis to distinguish *Ricks* from the facts of this case. In any event, as discussed, *supra* pp. 17-21, the employee's decision to resign in a constructive-discharge case "involves no official action," *Suders*, 542 U.S. at 148, and is "assimilated to a formal discharge" by the employer "for remedial purposes," *id.* at 141. And, contrary to the government's and Green's suggestion, *see* U.S. Br. 25-26; Pet. Br. 25, the Court's holding in *Ricks* did not hinge on the "inevitab[ility]" of the plaintiff's eventual termination, but on the fact that the "only challenged employment practice" was the employer's tenure decision, which "occur[red] before the termination date," 449 U.S. at 259. As the Court confirmed, "[i]t [wa]s simply insufficient for Ricks to allege that his termination 'g[ave] present effect to the past illegal act'"; the "emphasis is not upon the effects of earlier employment decisions"—whether inevitable or not—but on "'whether any present *violation* exists.'" *Id.* at 258.

That reading of *Ricks* is confirmed by the Court's decision one year later in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (per curiam). *Chardon* addressed the claims of school administrators who challenged their terminations on First Amendment grounds. The plaintiffs received notices on certain dates of their future terminations and brought suit more than one year after receiving the notices. 454 U.S. at 6-7. The Court held

their claims barred by the one-year statute of limitations applicable to 42 U.S.C. § 1983, concluding that the limitations period commenced at the time of the challenged decision of the employer, not the effective date of the terminations. *Id.* at 8. As in *Ricks*, the plaintiffs "allege[d] that the decision to terminate was made" for unlawful reasons. *Id.* And, as in *Ricks*, "[t]here were no other allegations ... of illegal acts subsequent to the date on which the decision[] to terminate w[as] made." *Id.* The "'[m]ere continuity'" of the plaintiffs' employment was "'insufficient to prolong the life of a cause of action for employment discrimination.'" *Id.* (quoting *Ricks*, 449 U.S. at 257).

Ricks in turn relied on *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 557-558 (1977), which similarly focused on the alleged unlawful conduct of the employer. The plaintiff in *Evans* was a flight attendant who had been forced to resign under a discriminatory policy that the airline subsequently abandoned. *Id.* at 554-555. The plaintiff did not challenge that policy at the time, and was later rehired. Under the airline's seniority system, she received no credit for her prior service. *Id.* at 555. The plaintiff sued for backpay and retroactive seniority, but the Court held that her claim was properly dismissed. *Id.* at 556-557. Although "the seniority system g[ave] present effect to a past act of discrimination," the "critical question" was whether "any present *violation* exist[ed]," and the plaintiff "ha[d] not alleged" any discrimination by the airline in administering the seniority system. *Id.* at 558. As the Court later explained in applying the private-sector EEOC deadline, "[t]he instruction provided by [this precedent] is clear": the period for filing a charge of discrimination begins when the alleged "unlawful practice takes place," not upon "the occurrence of subsequent nondiscriminatory

acts that entail adverse effects resulting from the past discrimination." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007), *superseded by statute on other grounds*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; *see also id.* at 621 ("the time for filing a charge of employment discrimination ... begins when the discriminatory act occurs"). The claims in *Evans* and *Ricks* were barred because "[i]n each case, the employee filed charges well after the discrete discriminatory act occurred"; "[n]o repetitive, cumulative discriminatory employment practice was at issue in either case." *Ledbetter*, 550 U.S. at 651-652 (Ginsburg, J., dissenting).[8]

These decisions confirm that in a constructive-discharge case, the "'proper focus'" in applying the limitations period in 29 C.F.R. § 1614.105(a)(1) should similarly be "'upon the time of the *discriminatory acts*,'" not upon the time when the employee feels the conse-

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[8] Ignoring the Court's actual holding in *Evans*, the government reads that decision to imply that if the plaintiff there had challenged her initial separation, the time limit for such a challenge would have run from the effective date of the separation. U.S. Br. 26-27. That issue was not before the Court. *Cf. Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) (disregarding dicta in prior case "in which the point now at issue was not fully debated"). In any event, in *Evans*, the time of the plaintiff's original resignation coincided with the time of the unlawful employment practice, which was the application to the plaintiff of a discriminatory policy requiring her to resign immediately upon her marriage. *See* 431 U.S. at 554-555. The Court's observation that any charge would have had to be filed with the EEOC "within 90 days of her separation" would therefore have been true regardless of whether the limitations period ran from the time of the employee's resignation or from the time of the employer's discriminatory conduct.

quences of those acts, *Ricks*, 449 U.S. at 258.[9] Suppose, for example, an employee were transferred to a less desirable position because of her gender. If she later found her new position intolerable and resigned—but did not allege that any discriminatory acts occurred after her transfer and did not allege that the intolerable conditions were themselves discriminatory—then her resignation would simply "give[] present effect to [the]

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[9] The EEOC has equated the operation of the federal-sector provision with the operation of the private-sector provision at issue in *Ricks* and similar cases. EEOC, *Compliance Manual: Threshold Issues* § 2-IV(C)(1), *available at* http://www.eeoc.gov/policy/docs/threshold.html (last visited Sept. 28, 2015).

In *Bailey* v. *United Airlines, Inc.*, 279 F.3d 194 (3d Cir. 2002), the EEOC argued in an amicus brief that the 180-day private-sector filing period began to run in that case on the date the employee rejected an option to resign and was consequently terminated, not on the earlier date when the employer presented that option. EEOC Amicus Br., *Bailey*, 2001 WL 34105245, at *6-15 (3d Cir. Mar. 26, 2001). In support of that argument, the EEOC analogized to the constructive-discharge context, citing cases holding that "the limitations period on a claim of constructive discharge begins to run when the employee 'effectively communicate[s] her intention to resign.'" *Id.* at *9. Green—but not the government—asserts (at 25-26) that the EEOC's statement in the *Bailey* brief is entitled to respect under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *Cf.* U.S. Br. 31. But *Bailey* involved a termination, not a constructive discharge, and did not present any question concerning the last-discriminatory-act rule. The statement in the *Bailey* brief addressing constructive discharge cannot be treated as reflecting the EEOC's considered views on the question presented here—particularly given the conflict between the EEOC's statement there and its other repeated statements that the federal- and private-sector filing periods begin to run at the time of the unlawful event or practice, *see, e.g.*, EEOC, *Compliance Manual: Threshold Issues* § 2-IV(C)(1); 57 Fed. Reg. 12,634, 12,634-12,635 (Apr. 10, 1992). *See Skidmore*, 323 U.S. at 140 (weight accorded agency position "depend[s] upon ... its consistency with earlier and later pronouncements").

past act of discrimination." *Evans*, 431 U.S. at 558. In such circumstances, where "the only challenged employment practice occur[red] before" the resignation date, the limitations period on any constructive-discharge claim would "necessarily commence to run before that date." *Ricks*, 449 U.S. at 259. Similarly, in Green's constructive-discharge claim, the discriminatory acts are those of the Postal Service precipitating his resignation, which occurred long before Green sought EEO counseling. Green's act of resignation itself was only a consequence of those illegal acts. Pet. App. 20a.

Relying on *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), Green contends (at 26) that where a claim is "'composed of a series of separate acts,'" the "most recent event 'contributing to the claim' triggers the filing period." But *Morgan*, too, focused on the unlawful conduct of the employer. In *Morgan*, the Court applied Title VII's limitations period for private-sector claims, which runs from the time the "'unlawful employment practice occurred.'" 536 U.S. at 109 (quoting 42 U.S.C. § 2000e-5(e)(1); emphasis omitted). "The critical questions" were "[w]hat constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" *Id.* at 110. The Court held that where a claim challenges a discrete discriminatory act, the limitations period runs from the date of that challenged act of the employer. *Id.* at 110-115. And where a claim challenges a discriminatory hostile work environment, at least one discriminatory act of the employer must occur within the filing period. *Id.* at 115-121. The Court did not hold that the employee's own act, or the

later consequences of the employer's discriminatory act, could trigger the filing period. *Id.* at 105.[10]

Here, the last alleged discriminatory act giving rise to Green's resignation was the December 16, 2009 settlement. Green did not initiate pre-complaint counseling on a constructive-discharge claim until March 22, 2010—more than three months later. Pet. App. 23a, 37a-38a. Green has not claimed that waiver, estoppel, or equitable tolling apply. Pet. App. 38a. Nor has he asserted that he lacked notice of the Postal Service's alleged discriminatory conduct or that he was otherwise entitled to an extension of the deadline. *Id.*; *see* 29 C.F.R. § 1614.105(a)(2).[11] Green's claim is barred.

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[10] *Morgan* also disposes of Green's contention that the words "matter alleged" in 29 C.F.R. § 1614.105(a)(1) somehow expand the trigger of the limitations period to include anything relating to the "'subject under consideration,'" Pet. Br. 17-18. Like Green's reading of "matter," the plaintiff in *Morgan* argued that the word "practice" in the private-sector limitations provision "connote[d] an ongoing violation that can endure or recur over a period of time." 536 U.S. at 110. But the Court held that discrete discriminatory acts of the employer occurring outside the filing period were not actionable, even if connected to other acts within the period. *Id.* at 110-113. The word "'practice'" did not "convert[] related discrete acts into a single unlawful practice for the purposes of timely filing." *Id.* at 111. The same is true with respect to the word "matter." *See, e.g.*, EEOC, *Compliance Manual: Threshold Issues* § 2-IV(C)(1) n.179 (EEOC equating "matter alleged to be discriminatory" with "the alleged discriminatory employment practice"); 57 Fed. Reg. at 12,635 (interpreting § 1614.105(a)(1) to refer to "the discriminatory event").

[11] Green also has not relied on the second prong of § 1614.105(a)(1), under which the 45-day period for initiating pre-complaint counseling "in the case of personnel action" runs from "the effective date of the action." The EEOC has taken inconsistent positions regarding the role of that provision in a constructive-discharge claim. *Compare, e.g.*, U.S. Br. 38 n.19 (citing EEOC

II. THE LAST-DISCRIMINATORY-ACT RULE IS CONSISTENT WITH STATUTE-OF-LIMITATIONS PRINCIPLES

Lacking support in constructive-discharge doctrine or this Court's Title VII precedent, Green and the government rely primarily on a "general rule" that limitations periods begin to run when a plaintiff has a "'complete and present cause of action.'" Pet. Br. 14-16 (quoting *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 418 (2005)); U.S. Br. 15-18. In fact, this Court's statute-of-limitations cases make clear that limitations periods commence at the time stated in the relevant textual provision—here, the date of the "matter alleged to be discriminatory," 29 C.F.R. § 1614.105(a)(1). No case supports substituting any default rule in place of the time referenced in the text.

In some statutes of limitations, the relevant text provides that the time period "begin[s] when the[] associated causes of action accrue." *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013). When applying limitations periods of that form, this Court "ordinarily" construes the reference to "accrual"

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decisions analyzing constructive-discharge claims as "personnel actions"), *with, e.g.*, *Zayas* v. *Shinseki*, 2012 WL 258370, at *1-2 (Office of Fed. Ops. Jan. 20, 2012) (examining "constructive discharge" under "matter alleged to be discriminatory" prong), *and Cabello* v. *Casellas*, 1996 WL 159158, at *3 (Office of Fed. Ops. Mar. 28, 1996) (same). As the court of appeals explained, however, that prong "must refer to the acts of the employer, not the employee." Pet. App. 20a n.3. Here, for example, even if a "personnel action" occurred in February or March 2010 upon the signing or effective date of Green's resignation, those events are not the subject of Green's claim. Green challenges acts of the Postal Service—whether "personnel actions" or not—that occurred on and before December 16, 2009. *See* Pet. App. 23a, 37a-38a; JA8-20.

to mean the time when the plaintiff has a complete and present cause of action on which he can file suit and obtain relief. *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 195, 201 (1997); *see also Heimeshoff*, 134 S. Ct. at 610; *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941) ("The words 'after the cause of action shall accrue' ... refer to 'a complete and present cause of action.'"); *TRW Inc.* v. *Andrews*, 534 U.S. 19, 36-37 (2001) (Scalia, J., concurring in the judgment) (statute running from date the "'cause of action arose'" should be read in light of background rule that limitations periods "begin[] to run at the time the plaintiff 'has the right to apply to the court for relief'"); *Clark* v. *Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875) (applying general rule to interpret statute requiring suit within ten years "after the[] cause[] accrue[d]" (applying Iowa Code § 2740.4 (1872)); 1 Corman, *Limitations of Actions* § 6.1 (1991) ("Frequently, legislation stating that commencement occurs when the plaintiff's cause of action accrues is interpreted by courts to mean that moment when the plaintiff has a complete and present cause of action.").

That general rule, however, is only a "default." *Graham County*, 545 U.S. at 418. "[S]tatutes of limitations do not inexorably commence upon accrual," *Heimeshoff*, 134 S. Ct. at 610, and when they do not, courts apply them according to their text—even when the textually prescribed limitations period begins to run before the cause of action accrues. In *Dodd* v. *United States*, 545 U.S. 353 (2005), for example, the Court gave effect to the one-year limitations provision in the federal habeas statute, which ties the start of the filing period not to the accrual of a cause of action, but to specified points in time including the date a new rule of constitutional law is recognized. *Id.* at 357-360. Alt-

hough applying the provision according to its terms would bar many prisoners from challenging their sentences based on a new rule of constitutional law, *id.* at 359-360, the Court concluded that it was "not free to rewrite the statute that Congress ha[d] enacted," *id.* at 359; *see also id.* ("'[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'").

Similarly, in *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197 (1952), this Court considered the Longshoremen's and Harbor Workers' Compensation Act, which provided that "'[t]he right to compensation for disability ... shall be barred unless a claim therefor is filed within one year after the injury.'" *Id.* at 197. The Court held that the one-year period began at the time of injury, not when the employee later became disabled as a result of the injury, concluding that "Congress meant what it said when it limited recovery to one year from date of injury, and 'injury' does not mean 'disability.'" *Id.* at 198-200. Although this interpretation meant that "an employee [could] be barred from filing his claim before his right to file it arises," the Court refused to "rewrite the statute of limitations" to avoid that result. *Id.* at 199-200. And in *McMahon* v. *United States*, 342 U.S. 25 (1951), the Court held that a two-year statute of limitations governing claims by seamen employed by the United States began to run on "the date of injury," even though a plaintiff could not sue until after his claim was administratively disallowed—a process that could take more than a year to complete. *Id.* at 26-27; *see also Heimeshoff*, 134 S. Ct. at 610-611 (enforcing contractual limitations provision that began to run at the time proof of loss was due, rather than at the later time the cause of action accrued).

This Court's Title VII cases follow the same approach. In *Ricks*, the relevant inquiry in applying Title VII's private-sector filing deadline was the one specified by the statute: the Court focused on identifying the "'unlawful employment practice' of which [the plaintiff] complains," not the time when the plaintiff had a complete and present cause of action. 449 U.S. at 257-258 (quoting 42 U.S.C. § 2000e-5(e)); *supra* pp. 21-23. Similarly, in *Morgan*, the "critical questions" were "[w]hat constitutes an 'unlawful employment practice' and when has that practice 'occurred?'" 536 U.S. at 110. The Court did not ask when the plaintiff had a complete and present cause of action.

To determine when the limitations period in 29 C.F.R. § 1614.105(a)(1) begins to run in this case, the Court must similarly identify the "matter" that Green "allege[s] to be discriminatory"—not the moment when he had a complete and present cause of action. And as discussed, *supra* pp. 17-21, in a constructive-discharge case, as in other Title VII contexts, the "matter alleged to be discriminatory" is the discriminatory conduct of the employer, not the employee's resignation.

Green notes that when "the text creating a filing period is unclear," the Court "defer[s] to the general rule" that statutes of limitations ordinarily begin to run upon accrual of the cause of action. Pet. Br. 16; *see also* U.S. Br. 20. But courts apply that default rule "to resolve ... ambiguity, not to create it in the first instance." *Graham County*, 545 U.S. at 419 n.2; *see, e.g.*, *id.* at 417-418 (construing limitations provision in light of default rule where provision's "literal text ... [wa]s ambiguous" and other textual clues supported that reading). Where, as here, the text of the limitations provision dictates that the filing period begins to run at a time other than the "accrual" of a cause of action, the

"default" rule does not override that text. *Id.* at 418; *see also Dodd*, 545 U.S. at 360 (refusing to apply default rule where "there is no such ambiguity" in the statute); *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013) (default accrual rule does not apply where text reflects a contrary mandate); *Bay Area Laundry*, 522 U.S. at 201 (default accrual rule does not apply where "Congress has told us otherwise in the legislation at issue").

Moreover, even if the meaning of 29 C.F.R. § 1614.105(a)(1) were unclear in the context of the constructive-discharge doctrine and this Court's precedent—which, as discussed, it is not—any ambiguity must be resolved in favor of a more stringent limitations period, not in favor of the employee. In the context of Title VII litigation by federal employees, "administrative exhaustion 'is a condition to the waiver of sovereign immunity,'" and therefore "'must be strictly construed.'" *Farris* v. *Shinseki*, 660 F.3d 557, 563 (1st Cir. 2011) (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 94 (1990)); *see McFarland* v. *Henderson*, 307 F.3d 402, 406 (6th Cir. 2002) (in Title VII, "Congress conditioned the government's waiver of sovereign immunity upon a plaintiff's satisfaction of 'rigorous administrative exhaustion requirements and time limitations'" (quoting *Brown* v. *GSA*, 425 U.S. 820, 833 (1976))). "[S]tatutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *McMahon*, 342 U.S. at 27. In *McMahon*, the Court applied that principle to reject the default accrual rule because the Court "c[ould] not construe the Act as giving claimants an option as to when they will choose to start the period of limitation of an action against the United States." *Id.*; *cf. United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). As the court of appeals recognized in this case, "[i]t is not [the]

office" of the courts "to expand the time limits beyond what the EEOC has set." Pet. App. 22a.

Green's reliance on *Mac's Shell Service Inc.* v. *Shell Oil Products Co.*, 559 U.S. 175 (2010), is misplaced. To the extent that decision bears any relevance, it only confirms that courts apply statutes of limitations according to their text. The issue before the Court in *Mac's Shell* was not one of timeliness, but whether a franchisee that had not abandoned its franchise could recover for constructive termination under the Petroleum Marketing Practices Act ("PMPA"). *Id.* at 177-178. Green emphasizes (at 21-23) the Court's discussion of the PMPA's statute of limitations, which ran from "the later of" "'the date of termination of the franchise'" or "'the date the franchisor fails to comply'" with PMPA requirements. *Mac's Shell*, 559 U.S. at 189 (quoting 15 U.S.C. § 2805(a)). But the Court cited that language only to support its holding that no cause of action for constructive discharge could lie under the PMPA unless the franchise relationship had terminated. *Id.* at 189-190. And the fact that the PMPA's limitations period ran in some cases from the time of termination, as Green underscores, simply reflected Congress's choice to tie the statute of limitations to "the later of" "the date of termination" or the date of the violation. The EEOC chose different language here.

Green also cites (at 31-32) state-law constructive-discharge cases, but there is no indication in 29 C.F.R. § 1614.105(a)(1) or Title VII that Congress or the EEOC meant to import any common-law regime into the particularized administrative exhaustion process for federal employees. In any event, in the majority of the cases Green cites, the state courts did not consider whether the limitations period could run from the time of the employer's last discriminatory act. In each of

those cases, the claim would have been untimely even if the period did not begin to run until the employee gave notice of resignation. The courts considered only whether the limitations period could run from the later effective date of resignation. *See* U.S. Br. 20-23 & n.10.[12] Of the cases Green cites that did consider the issue presented here, two agreed that "in the context of a constructive discharge it is the *employer's* wrongful act that starts the period of limitations"—"not the *employee's* response." *Joliet* v. *Pitoniak*, 715 N.W.2d 60, 68 (Mich. 2006); *see also Harmon* v. *Higgins*, 426 S.E.2d 344, 347 (W. Va. 1992) (statute of limitations "begins to run on the date of the last offensive contact, or threat of offensive contact, which precipitated the termination of employment"). A third case considered and rejected a last-discriminatory-act rule, but only because the cause of action at issue called for a different rule. *See Mullins* v. *Rockwell Int'l Corp.*, 936 P.2d 1246, 1252 (Cal. 1997). Addressing a breach-of-contract claim, the court there explained that discriminatory acts predating the employee's resignation constituted only an anticipatory

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[12] *See Jeffery* v. *City of Nashua*, 48 A.3d 931, 934 (N.H. 2012) (plaintiff argued for effective-date-of-resignation rule rather than date-of-notice rule); *Patterson* v. *State Dep't of Health & Welfare*, 256 P.3d 718, 725 (Idaho 2011) ("[T]his Court must determine whether [plaintiff's] claim for constructive discharge arose with her resignation notice on March 16, or with the effective date of her termination on March 30."); *Whye* v. *City Council for City of Topeka*, 102 P.3d 384, 385 (Kan. 2004) (considering as possible accrual dates "(1) the date the employee notifies the employer of his or her intention to retire; (2) the date the employer accepts the employee's offer to retire; and (3) the effective date of the retirement"); *Stupek* v. *Wyle Labs. Corp.*, 963 P.2d 678, 680-681 (Or. 1998) (considering effective date of resignation and date employee gave notice of resignation); *Hancock* v. *Bureau of Nat'l Affairs, Inc.*, 645 A.2d 588, 590 (D.C. 1994) (similar); *Douchette* v. *Bethel Sch. Dist. No. 403*, 818 P.2d 1362, 1367 (Wash. 1991) (similar).

breach; the employee could elect to wait until an actual breach occurred to bring suit, and "the statute of limitations did not begin to run until he made that election by resigning." *Id.* at 1250. The court distinguished the federal antidiscrimination context, explaining that it "involve[d] a statutory scheme defining the act of discrimination as a wrong" that triggered the limitations period. *Id.* at 1252.[13]

Finally, contrary to Green's assertion (at 18-20), the traditional distinction between statutes of limitations and statutes of repose does not affect the analysis in this case. As explained above, this Court has repeatedly recognized that a statute of limitations can commence at a time other than accrual without losing its character as a limitations period. *See supra* pp. 30-33; *Heimeshoff*, 134 S. Ct. at 615 (contractual provision established a period of "limitations" subject to waiver, estoppel, and equitable tolling that began to run before cause of action accrued); *Dodd*, 545 U.S. at 359 (construing a "statute of limitations"); *Pillsbury*, 342 U.S. at 200 (same); *McMahon*, 342 U.S. at 27 (same). As in those cases, faithfully applying the text of 29 C.F.R. § 1614.105(a)(1) does not convert the limitations period into one of repose. Moreover, whereas a statute of repose can begin to run even before any injury has occurred, *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182-2183 (2014), tying the filing period in 29 C.F.R. § 1614.105(a)(1) to the date of the employer's last discriminatory act does not produce that result. In a con-

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[13] The constructive-eviction doctrine similarly sheds no light on the distinct federal limitations provision at issue here, and the sole case Green cites (at 23) considered only a D.C. statute of limitations running from the "accru[al]" of the cause of action. *National Railroad Passenger Corp.* v. *Notter*, 677 F. Supp. 1, 4 (D.D.C. 1987) (applying D.C. Code § 12-301).

structive discharge, an employee suffers injury and has a complete and present cause of action for discrimination under Title VII as soon as the employer commits the predicate unlawful discriminatory practice; the employee's later resignation changes only the damages recoverable for that violation. *Supra* pp. 17-21. Applying the last-discriminatory-act rule accords with the principle that limitations periods can begin to run when the wrongful act first results in damages, "'even though the full extent of the injury is not then known or predictable.'" *Wallace* v. *Kato*, 549 U.S. 384, 391 (2007) (quoting 1 Corman, *Limitation of Actions* § 7.4.1).

III. Title VII Policies Of Conciliation, Administrability, And Fairness Favor The Last-Discriminatory-Act Rule

Green contends that a date-of-resignation rule would "further[] Title VII's goals of administrability, fairness, and conciliation." Pet. Br. 27 (capitalization altered). In fact, the regulatory scheme's goal of facilitating early, informal resolution of employment disputes in the federal sector before "positions on both sides have ... hardened," 57 Fed. Reg. 12,634, 12,635 (Apr. 10, 1992), is met only by the last-discriminatory-act rule, which requires prompt initiation of the pre-complaint counseling process. And Green's arguments about fairness and administrability are both misplaced and overstated. These concerns—which were also advanced and rejected by this Court in *Ricks*—cannot trump the regulatory scheme. Nor are they necessarily addressed by Green's rule, as this case demonstrates.

A. The Last-Discriminatory-Act Rule Promotes The Purpose Of Pre-Complaint Counseling

"Voluntary compliance with Title VII," through "cooperation and conciliation," "is an important public policy." *W.R. Grace & Co.* v. *Local Union 759*, 461 U.S. 757, 770 (1983); *see Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015). To that end, 29 C.F.R. § 1614.105(a)(1) requires prompt initiation of counseling to encourage "informal resolution ... , freely arrived at by all parties involved"—the recognized "best outcome" for the federal antidiscrimination regime. EEOC, *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614*, at 2-14 (rev. Aug. 5, 2015) ("EEO-MD-110"). The short 45-day deadline reflects the EEOC's considered judgment that, in the federal sector, "the earliest possible contact with a counselor aids resolution of disputes because positions on both sides have not yet hardened." 57 Fed. Reg. at 12,635; *supra* pp. 4-5.

The last-discriminatory-act rule promotes that objective by requiring that an employee consult a counselor about the underlying discrimination—*i.e.*, the discrimination that, if left unaddressed, might precipitate the employee's resignation—at a time when informal resolution may still be possible. If counseling is successful, then no administrative complaint will be filed, the employee will remain employed, and no constructive-discharge issue arises. That is precisely the goal of pre-complaint counseling for federal-sector employees.

Green and the government would defer the employee's deadline for initiating counseling until the employee has resigned—a resignation that in many cases might have been avoided had counseling been sought earlier. That approach contravenes the goals of the

regulatory regime. As courts have recognized, "society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships." *Bourque* v. *Powell Elec. Mfg. Co.*, 617 F.2d 61, 66 (5th Cir. 1980); *see also Duncan* v. *General Motors Corp.*, 300 F.3d 928, 936 (8th Cir. 2002) (same); *EEOC* v. *L.B. Foster Co.*, 123 F.3d 746, 755 (3d Cir. 1997) (same); Pet. App. 21a. By the time the employee has resigned, the positions of the now-former employee and agency accused of discrimination will have hardened; pre-complaint counseling is at that point much less likely to resolve the conflict.

Green's amici make that point plain. *See* NAACP Br. 13-14. Amici contend that a date-of-resignation rule gives employees time to weigh the "enormous" "stakes involved in a decision to resign ... for the personal life, economic livelihood, and professional trajectory of the employee." *Id.* But delaying informal counseling until the employee has already weighed those considerations and committed to resign would make conciliation all but impossible.

Conflating the private-sector requirement to file a EEOC charge with the federal-sector requirement to initiate pre-complaint counseling—and invoking an argument this Court rejected in *Ricks*, 449 U.S. at 259 n.11—Green asserts (at 35-36) that "filing a complaint while on the job may strain relationships with an employer" and undermine efforts to "work things out." But pre-complaint counseling does not entail filing a complaint. Its aim is to forestall the filing of a complaint by attempting to "work things out" in the manner the EEOC has deemed most conducive to that end. And EEOC data confirm that, far from producing any

"strain" on employment relationships, pre-complaint counseling is often effective on that front.[14]

Green also says (at 35) that the last-discriminatory-act rule would "encourage employees to quit soon after perceived discriminatory acts to avoid a time bar." But the last-discriminatory-act rule does not require quitting; it requires that an employee consult a counselor. *See supra* pp. 4-5, 39. If counseling fails to yield a resolution, the employee need not immediately quit and bring a constructive-discharge claim. Rather, the employee can file an administrative complaint based on the underlying discrimination and, should he later resign, amend his complaint to include a related constructive-discharge claim. *See* EEO-MD-110, at 5-10 to 5-13; *supra* p. 7.

Green and the government question whether an amendment could "solve the problem," Pet. Br. 34; *see also* U.S. Br. 30, but the EEOC has long endorsed this procedure in the precise context of constructive discharge. An example from the EEOC management directive illustrates the point:

> An agency employee files a complaint of discrimination when his request for a hardship transfer is denied. During the investigation into his complaint, the complainant sends a letter

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[14] In 2012, "[p]re-complaint EEO counseling ... addressed many employee concerns before they resulted in formal EEO complaints. Of the 34,521 instances of counseling ... , 54.2% did not result in a formal complaint, due either to settlement by the parties or withdrawal from the EEO process." EEOC, *Annual Report on the Federal Work Force Part I: Fiscal Year 2012*, at iii, *available at* http://www.eeoc.gov/federal/reports/fsp2012/upload/FY-2012-Annual-Report-Part-I-Complete.pdf (last visited Sept. 28, 2015).

> to the EEO office stating that he has decided to resign from the agency because of the agency's failure to transfer him and the resulting stress. He further states that he is no longer seeking the transfer as a remedy to his complaint, but asserts he is entitled to a compensatory damages award instead. The EEO office should amend the original complaint to include the complainant's new like or related claim of constructive discharge.

EEO-MD-110, at 5-13; *accord* EEOC, *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614*, at 5-12 (as revised, Nov. 9, 1999).[15] Green and the government also note a comment by the EEOC that "[t]he fact that you filed an earlier charge may not extend the deadline." EEOC, *After You Have Filed a Charge*, *available at* http://www.eeoc.gov/employees/afterfiling.cfm (last visited Sept. 28, 2015). That general statement is surely true, since an amendment must relate to the issue previously raised. *See* 29 C.F.R. §§ 1601.12(b), 1614.106(d). In a constructive-discharge case, however, the underlying discrimination will necessarily be "like or related to" the resignation for purposes of the amendment procedure. *See, e.g.*, Pet. Br. i (addressing "discriminatory act giving rise to the resignation"); *see also* EEO-MD-110, at 5-13; *supra* n.3.[16]

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[15] This procedure thus does not invite any "multipl[ying]" of claims, as employees need only amend the original complaint. *Cf.* U.S. Br. 30.

[16] Citing *Hebert* v. *Mohawk Rubber Co.*, 872 F.2d 1104 (1st Cir. 1989), and *Young* v. *National Center for Health Services Research*, 828 F.2d 235 (4th Cir. 1987), Green says (at 33-34) that constructive discharge "does not require" an independently actionable underlying act of discrimination, and that "some constructively

B. Green's Concerns For Administrability And Fairness Lack Merit

Green contends that the "date-of-resignation rule is the 'simple approach,' which is easy to understand and apply." Pet. Br. 28 (citation omitted); *see also* NAACP Br. 17. Green's dispute with the government over how to apply that rule to the facts of this case belies that assertion. *Compare* U.S. Br. 32-34 (Green resigned when he signed the settlement agreement), *with* Pet. Br. 7-8 (Green resigned when he signed his resignation papers). As their disagreement shows, adjudicators must review "disputed timelines" to determine "whether, and exactly when, particular acts took place" under the date-of-resignation rule no differently than under the last-discriminatory-act rule. Pet. Br. 28. Indeed, such determinations are the bread and butter of all statute-of-limitations cases. *E.g.*, *Wallace* v. *Donley*, 2010 WL 3314272, at *4 (Office of Fed. Ops. Aug. 12, 2010) (rejecting employee's "dispute[]" regarding "dates" and finding hostile-work-environment claim barred where the record revealed that the employee failed to timely initiate counseling).[17]

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discharged employees" will therefore "have no earlier complaints to amend." Green's premise is incorrect. A "constructive discharge claim cannot exist independently of a discrimination claim." Shuck, 23 Berkeley J. Emp. & Lab. Law at 416; *supra* p. 19. And in both *Hebert* and *Young*, the plaintiffs could have filed earlier complaints on underlying acts of discrimination. *See Hebert*, 872 F.2d at 1113 (underlying discrimination was choice between early retirement or discharge); *Young*, 828 F.2d at 237-238 (underlying discrimination was "[c]ontinual harassment").

[17] Green cites (at 28) *Barone* v. *United Airlines, Inc.*, 355 F. App'x 169 (10th Cir. 2009), but *Barone* had nothing to do with timeliness, and no relevant dates were in question.

The constructive-discharge context adds no unusual complexity to the application of the last-discriminatory-act rule. Green contends (at 12, 29-31) that courts would struggle under that rule with "issues of substantive antidiscrimination law" to decide whether an employer's alleged conduct was "sufficiently 'discriminatory' to trigger the limitations period." That misapprehends the inquiry under the limitations provision. A court assessing timeliness need not decide on the merits whether the employer's alleged conduct was unlawful; it need only determine when the employee says the "matter *alleged to be* discriminatory" occurred. 29 C.F.R. § 1614.105(a)(1) (emphasis added).

That inquiry in turn is precisely the same inquiry that courts make to determine the timeliness of a federal employee's EEO contact in any other kind of discrimination case. As the cases Green cites (at 31) acknowledge, it is "settled that the applicable administrative deadlines run from the time of the discriminatory act." *Young* v. *National Ctr. for Health Servs. Research*, 828 F.2d 235, 237 (4th Cir. 1987). For example, Green highlights constructive-discharge claims "emerg[ing] from an allegedly hostile work environment," emphasizing the complications of assessing "when a hostile work environment existed," and whether certain conduct constitutes a "'last act.'" Pet. Br. 29, 30; *see also* NAACP Br. 21. But those are the same determinations courts must make to assess the timeliness of a hostile-work-environment claim that does *not* involve a constructive discharge. *See, e.g.*, *Sturdivant* v. *City of Atl.*, 596 F. App'x 825, 828 (11th Cir. 2015) (per curiam) (because "the last acts that could arguably be said to have contributed to the alleged hostile work environment," *i.e.*, "laughing and smirking," occurred more than 180 days from the filing

of administrative complaint, claim was time-barred). The same is true for retaliation claims. *See, e.g., Wilks* v. *Elizabeth Arden, Inc.*, 507 F. Supp. 2d 179, 192 (D. Conn. 2007) (plaintiff barred from asserting any "acts of ... retaliation under Title VII" occurring outside the limitations period); *see also, e.g., Bass* v. *Joliet Pub. Sch. Dist. No. 86*, 746 F.3d 835, 840 (7th Cir. 2014) (claim of sex discrimination untimely where "discriminatory actions" took place "outside the 300-day window"); *cf.* Pet. Br. 30.

Green's predictions that the last-discriminatory-act rule will unfairly trap unwary lay litigants—an argument the Court rejected in *Ricks*, 449 U.S. at 259-260—are equally overblown. As an initial matter, Green overstates (at 27) the volume of cases the last-discriminatory-act rule will affect. As the government notes (at 31 n.12), constructive-discharge claims "accounted for only a small fraction" of Title VII charges before the EEOC in 2014. And, as discussed, in many constructive-discharge cases, the time of the employee's resignation will coincide with or follow closely behind the time of the employer's last discriminatory act, *supra* pp. 20-21, making the choice of rule inconsequential. Where that is not so, however, a diligent claimant can and should pursue EEO counseling on the underlying act of discrimination and, if necessary, amend the administrative complaint later if the alleged discrimination leads to resignation. *Supra* pp. 40-41.

Green—who was represented by counsel when he pursued his constructive-discharge claim in the EEO process, *supra* p. 11—posits (at 33) that an unrepresented lay employee might not know about the applicable time limits or how they work. But § 1614.105(a)(2) contains a "feature uncommon to statutes of limitations" that "absolve[s]" an employee "from complying

with the filing period" where the employee was not "aware" of the time limits, where the employee did not know and reasonably should not have known that the discriminatory matter occurred, or for any other reason considered sufficient by the agency or EEOC. *Pauling* v. *Secretary, Dep't of Interior*, 160 F.3d 133, 136 (2d Cir. 1998); *see supra* p. 6. Green also speculates (at 37) that the last-discriminatory-act rule would allow an employer to "insulat[e] itself from a constructive discharge claim" by "lull[ing] unwary employees into letting their claims lapse." This argument again ignores the text of the regulation, which recognizes the applicability of equitable rules designed to protect claimants from precisely such mischief. 29 C.F.R. § 1614.604(c) (45-day deadline is "subject to waiver, estoppel and equitable tolling"); *see also, e.g.*, *Heimeshoff*, 134 S. Ct. at 615 ("courts are well equipped to apply traditional doctrines," including equitable tolling, waiver, or estoppel, when defendant's conduct or other circumstances prevent the plaintiff from filing claim); *Irwin*, 498 U.S. at 96 (equitable tolling available where "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"); *Cochran* v. *Reno*, 1996 WL 705504, at *2 (Office of Fed. Ops. Nov. 27, 1996) (allowing claim to proceed despite two-year delay to determine "whether appellant was misled"). Green thus cites no evidence of "unwary" claimants who have been trapped unfairly by the limitations provision in those circuits that have adopted the last-discriminatory-act rule.

It is true that the federal-sector exhaustion requirements and time limitations are "rigorous." *Brown*, 425 U.S. at 833. That is by design. The EEOC sought to promote "the earliest possible contact with a counselor" to "aid[] resolution of disputes." 57 Fed. Reg. at

12,635; *cf. Morgan*, 536 U.S. at 109 ("'[B]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.'"). Those short time limits "also protect employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-257. As the court of appeals explained below, the date-of-resignation rule contravenes that "essential feature of limitations periods by allowing the employee to extend the date of accrual." Pet. App. 20a-21a. This Court should similarly reject a construction of 29 C.F.R. § 1614.105(a)(1) that would "giv[e] claimants an option"—as the date-of-resignation rule does—"as to when they will choose to start the period of limitation." *McMahon*, 342 U.S. at 27; *see also Pillsbury*, 342 U.S. at 200. Rather, "'strict adherence to the procedural requirements specified" by regulation "is the best guarantee of evenhanded administration of the law.'" *Morgan*, 536 U.S. at 108.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF AFFIRMANCE

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IN THE

Supreme Court of the United States

No. 14-613

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF AFFIRMANCE

The Equal Employment Advisory Council and National Federation of Independent Business Small Business Legal Center respectfully submit this brief as *amici curiae* in support of the decision below.[1]

[1] The parties have consented to the filing of this brief. Counsel for *amici curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small

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amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

businesses nationwide, such as the case before the Court in this action.

Many of *amici*'s members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. As representatives of potential defendants to Title VII discrimination charges and lawsuits, *amici*'s members have a substantial interest in the issue presented in this case regarding the point at which the statute of limitations begins to run on a claim for constructive discharge under the Act. The Tenth Circuit below correctly held that the limitations period begins to run as of the date of the last alleged discriminatory act of the employer, not as of the plaintiff's eventual resignation.

As national representatives of many professionals whose primary responsibility is compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can assist the Court to assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC and NFIB have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved important questions of Title VII's proper interpretation and application. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

Marvin Green was employed by the United States Postal Service (Postal Service) as a Level-22 Postmaster for Englewood, Colorado. Pet. App. 3a. In 2008, Green applied for promotion to a more senior postmaster position in Boulder, Colorado, but was not selected. *Id.* Later that year, Green filed a failure to promote race discrimination claim with the Postal Service's Equal Employment Opportunity (EEO) Office. *Id.* In May and July 2009, Green again complained, this time alleging that he had been subjected to unlawful retaliation because of his prior EEO activity. Pet. App. 3a-4a.

In November 2009, the Postal Service ordered Green to appear for an investigative interview to discuss allegations that he had violated agency procedures when processing subordinate employees' grievances. Pet. App. 4a. On December 11, 2009, Green appeared at the interview, and met with the Postal Service's human resources and labor relations managers to discuss the allegations. *Id.* Later that day, the Postal Service informed Green that he was being removed from duty because of his disruption of day-to-day postal operations, and that he would be returned to duty "when the cause for nonpay status ceases." Pet. App. 5a.

On December 16, 2009, Green and the Postal Service executed a settlement agreement in which the agency agreed not to pursue any charges against Green based on the issues discussed during the December 11, 2009 interview. Pet. App. 5a. In exchange, Green agreed to "immediately relinquish" his Level-22 Postmaster position, and to accept a demotion to a lower paying, Level-13 position in Wyoming. J.A. 60. In addition, the Postal Service agreed to provide Green with "saved

salary" (*i.e.*, the higher rate of pay associated with his former position) until March 30, 2010, and allow him to use accrued annual and sick leave from December 14, 2009 through March 31, 2010. *Id.* Finally, the agreement provided:

> Mr. Green agrees to retire from the Postal Service no later than March 31, 2010. Mr. Green agrees to take all necessary steps to effect his retirement on or before March 31, 2010. If retirement from the Postal Service does not occur, Mr. Green will report for duty in Wamsutter, Wyoming on April 1, 2010 and the saved salary shall immediately cease.

J.A. 60-61. As contemplated by the agreement, Green began using annual and sick leave and on February 9, 2010, submitted his retirement papers, with an effective date of March 31, 2010. Pet. App. 6a.

On March 22, 2010, Green contacted an EEO counselor and filed an informal complaint alleging "that he had been constructively discharged by being forced to retire in retaliation for prior EEO activity." Pet. App. 6a, 32a. He filed a formal complaint on April 23, 2010, which the Postal Service's EEO Office eventually dismissed. J.A. 25.

Green subsequently sued the Postal Service for, among other things, constructive discharge in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended. J.A. 8-21. He claimed that the Postal Service engaged in a course of retaliatory conduct that "included, but [was] not limited to, a calculated pattern of harassment, bullying, insults, humiliation, and unjustified discriminatory actions," J.A. 20, and which culminated in his forced retirement on March 31, 2010. J.A. 8-21.

The Postal Service moved for summary judgment on the ground that Green failed to timely file an administrative claim of constructive discharge and therefore was barred from suing on that basis. J.A. 90-105. The district court agreed, finding that Green was required to file his EEO complaint within 45 days of execution of the settlement agreement – which called for his transfer and eventual retirement on March 31, 2010. Pet. App. 35a-37a. It concluded that because Green waited until March 22, 2010 to complain about alleged constructive discharge, his subsequent claim on that basis was untimely. Pet. App. 33a-50a.

On appeal, the Tenth Circuit affirmed, concluding that because all of the Postal Service's allegedly discriminatory or retaliatory acts on which Green's constructive discharge claim was based occurred on or before December 16, 2009, *i.e.*, the date the parties entered into the settlement agreement, Green was required to have lodged his EEO complaint within 45 days of that date, *i.e.*, on or about January 30, 2010. Pet. App. 15a-23a. Because he did not make contact with the Postal Service's EEO Office until March 22, 2010 – over 90 days after the last alleged discriminatory act – the Tenth Circuit agreed that Green could not proceed with his constructive discharge claim. Pet. App. 16a, 23a.

Acknowledging that the majority of courts to have considered the issue have held that a constructive discharge claim accrues as of the date of resignation, Pet. App. 18a, the Tenth Circuit refused to "endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer" for purposes of the 45-day limitations period. Pet. App. 20a. It thus held that "the start

of the limitations period for constructive-discharge claims is the same as for other claims of discrimination[,]" which in most instances is the date of the last alleged discriminatory act of the employer. Pet. App. 16a, 22a.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, requires an aggrieved individual to file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 or 300 days of the allegedly discriminatory event. *See United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 257-58 (1980); *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009). As this Court made clear in *Delaware State College v. Ricks*, "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." 449 U.S. at 258 (citation and internal quotation omitted) (emphasis added in *Ricks*).

To establish a constructive discharge under Title VII, a claimant must demonstrate that due to the employer's discriminatory actions, the individual's working conditions became "so intolerable that a reasonable person in the employee's position would have felt compelled to resign[.]" *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004). Under this Court's longstanding Title VII precedent, the statute of limitations on a constructive discharge claim should run from the employer's alleged discriminatory act,

rather than from the claimant's eventual resignation – which merely is a lingering consequence of the prior alleged discrimination.

Indeed, allowing limitations for constructive discharge claims to belatedly run from the date an individual ultimately elects to resign would be contrary to the purpose of statutes of limitations, which serve the important function of preventing litigation of stale claims. With the passage of time, memories fade, witnesses scatter, and records become unavailable. Indeed, many employment records lawfully may be destroyed after as little as one year under current federal regulations. *See* 29 C.F.R. § 1602.14. Limitations periods are intended to protect those "who promptly assert their rights, [but] also protect employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-57 (citations omitted).

This Court has recognized that Title VII's statutory scheme provides for relatively brief limitations periods, which Congress deliberately established to encourage prompt processing of all charges of discrimination. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 825-26 (1980). Promptly filed claims yield the benefit of providing early notice to an employer of alleged workplace discrimination, thereby offering an opportunity for informal and cooperative resolution of the issue, in accordance with the well-recognized objectives of Title VII.

If, as Petitioner suggests, the time for initiating an administrative charge of constructive discharge does not begin to run until the employee ultimately resigns, regardless of when the underlying discriminatory act that allegedly compelled the resignation occurred, the result would be the virtual elimination of the brief

limitations period that Congress intended. The net effect of the position urged by Petitioner in this case would be to increase dramatically the litigation of stale constructive discharge claims. This Court should not endorse such a result.

ARGUMENT

I. THE TIME FOR FILING AN ADMINISTRATIVE CHARGE OF CONSTRUCTIVE DISCHARGE UNDER TITLE VII BEGINS TO RUN AFTER THE LAST DISCRIMINATORY ACT OCCURS, NOT WHEN THE COMPLAINANT EVENTUALLY DECIDES TO QUIT

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, prohibits discrimination in the terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Among the various types of actions that can give rise to a violation, this Court has recognized that Title VII "encompasses employer liability for a constructive discharge." *Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004). Constructive discharge occurs when, due to the discriminatory actions of his or her employer, an individual's working conditions are rendered "so intolerable that a reasonable person in the employee's position would have felt compelled to resign." *Id.* at 147.

A. Title VII Requires An Aggrieved Individual To Exhaust Administrative Remedies Within A Specified Time Period

Title VII "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 US. 36, 47 (1974). In the private sector, Title VII requires that any aggrieved person alleging a violation of the Act file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged discriminatory act occurred, 42 U.S.C. § 2000e-5(e), except where the individual has filed a discrimination charge with a state or local enforcement agency with authority to grant or seek relief, in which case he or she has "three hundred days after the alleged unlawful employment practice occurred" to file an EEOC charge. 42 U.S.C. § 2000e-5(e)(1). Generally, no other exceptions extend the length of Title VII's limitations period in the private sector. *Cf. infra* Section I(B).

That charge filing limitations period accrues from the date of the "alleged unlawful employment practice," 42 U.S.C. § 2000e-5(e)(1), which in the case of a "discrete" act (such as, for instance, a constructive discharge) is the date on which the act "occurred" or "happened."[2] *National R.R. Passenger Corp. v.*

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[2] *Morgan* distinguished hostile work environment claims from claims involving "discrete" acts, explaining that a hostile work environment generally involves repeated conduct that occurs over a period of time — perhaps even years. *Morgan*, 536 U.S. at 115. While a single act may not be sufficient to support a claim of hostile environment discrimination under Title VII, the Court

Morgan, 536 U.S. 101, 110, 113 (2002). As this Court has observed, "An individual must file a charge within the statutory time period and serve notice upon the person against whom the charge is made. ... A claim is time barred if it is not filed within these time limits." *Id.* at 109.

B. From *Evans* To *Ledbetter*, This Court Consistently Has Held That The Lingering Consequences Of Past Acts Have No Legal Effect Under Title VII

Once again, this Court has been called upon "to apply established precedent in a slightly different context." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009). From its 1977 decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), to its 2007 ruling in *Ledbetter v. Goodyear*, this Court consistently has held that the lingering consequences of past acts, even past discriminatory acts, have no present legal effect and thus are not actionable under Title VII. *See Evans*, 431 U.S. at 558; *Delaware State Coll. v. Ricks*, 449 U.S. 250, 257-58 (1980); *Morgan*, 536 U.S. at 113; *Ledbetter*, 550 U.S. at 636.

The plaintiff in *Evans* worked as a flight attendant from 1966 to 1968. When she married in 1968, she was required to resign her employment pursuant to a company policy in place at the time that barred married women from working as flight attendants. In 1972, United rehired Evans as a new employee. She

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said, the cumulative total may. *Id.* Therefore, this Court interpreted Title VII as giving individuals 180 or 300 days from *any* act that forms part of the hostile environment claim to file an EEOC charge of harassment. *Id.* at 117-18.

was not given any seniority credit for her prior service, and "for seniority purposes, she [was] treated as though she had no prior service with United." 431 U.S. at 555 (footnote omitted).

Evans claimed that United was guilty of a present violation of Title VII because it did not give her credit after her rehire for service prior to her forced resignation in 1968. The Court explained that assuming her 1968 separation violated Title VII, "the question now presented is whether the employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972 [when she was rehired]." *Id.* at 554. As the district court there noted, Evans was "seeking to have this court merely reinstate her November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation." *Id.* at 556 n.8.

This Court held that Evans had failed to file a timely charge of discrimination. *Id.* at 558 (United Air Lines "was entitled to treat that past act *as lawful* after respondent failed to file a [timely] charge") (emphasis added). It also rejected Evans' claim that her employer's failure to credit her with past seniority could be considered a "present *violation*." *Id.* An alleged discriminatory act that has not been made the subject of a timely charge, the Court held, "is the legal equivalent of a discriminatory act which occurred before the statute was passed." *Id.* Thus, it is "merely an unfortunate event in history which has *no present legal consequences*." *Id.* (emphasis added).

Subsequent decisions of this Court have followed that principle. In *Delaware State College v. Ricks*, the Court held that the plaintiff's discriminatory termination claim began to run upon notice of tenure denial, *not* termination, which was the "delayed, but

inevitable consequence of the denial of tenure." 449 U.S. at 257-58. Applying *Evans*, it explained that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination," *id.* at 257 (citation omitted), and that "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* at 258 (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)) (emphasis added in *Ricks*). Relying again on *Evans* and *Ricks*, the Court in *National Railroad Passenger Corp. v. Morgan* held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." 536 U.S. 101, 113 (2002).

This Court reaffirmed *Evans*, *Ricks*, and *Morgan* five years later in *Ledbetter*. There, the plaintiff sought to challenge pay decisions made throughout her nearly 20-year career on the theory that the sum total led to her being paid substantially less than her male colleagues. Concluding that she failed to timely file a Title VII discrimination charge with the EEOC, thus depriving the federal courts of jurisdiction over the matter, this Court pointed out:

> The instruction provided by *Evans*, *Ricks*, ... and *Morgan* is clear. The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed.

550 U.S. at 628 (citation omitted), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009). It thus expressly rejected "the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period." *Id.* at 632.

That reasoning applies with equal force here, where an act of alleged constructive discharge remained unchallenged from the time Petitioner's resignation was negotiated then memorialized in a written settlement agreement, to just shortly before Petitioner would be required to hold up his side of the bargain. As an initial matter, Petitioner's contention that his resignation, which was a term of the agreement he negotiated with the Postal Service, was "forced" is disingenuous at best. Nevertheless, to the extent that he has suggested the settlement agreement he signed was somehow part and parcel of a course of conduct intended to force his constructive discharge (that is, even if he felt compelled to sign), he still was required to lodge a timely complaint within 45 days of having done so.[3]

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[3] In 2009, Congress amended Title VII to extend the time period for bringing a claim of unlawful compensation discrimination under the Act. The Ledbetter Fair Pay Act of 2009 (Fair Pay Act), Pub. L. No. 111-2, 123 Stat. 5 (2009) provides:

> For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is

Virtually all forms of employment discrimination have some consequential effect on their victims. Nevertheless, this Court's rulings confirm that continuing effects alone cannot justify the failure to file a timely discrimination charge. *Evans*, 431 U.S. at 557; *Ricks*, 449 U.S. at 258; *Morgan*, 536 U.S. at 114; *Ledbetter*, 550 U.S. at 625. That principle applies equally to claims brought by federal sector employees like Petitioner, who are subject to a 45-day limitations period, as to private sector claims subject to the 180/300-day limitations period.

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affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

42 U.S.C. § 2000e-5(e)(3)(A). The Fair Pay Act also extends the time period for bringing a compensation discrimination claim under the Age Discrimination in Employment Act, 29 U.S.C. § 626(d)(3), the Americans with Disabilities Act, 42 U.S.C. § 12117(a), and the Rehabilitation Act of 1973, 29 U.S.C. §§ 791(f), 794(d).

The Fair Pay Act thus permits those alleging compensation discrimination to file an EEOC charge within 300 days of receipt of a paycheck or other form of compensation that carries forward the effects of past discriminatory compensation practices, whether or not the discrimination actually occurred within the statutory charge filing limitations period. Because constructive discharge is not a "compensation decision," however, the Fair Pay Act does not operate to save Petitioner's untimely claim.

II. EXTENDING THE STATUTE OF LIMITATIONS FOR A CONSTRUCTIVE DISCHARGE CLAIM TO A POINT LONG AFTER THE ALLEGED DISCRIMINATORY ACT ON WHICH IT IS BASED IS CONTRARY TO THE PURPOSES UNDERLYING STATUTES OF LIMITATIONS GENERALLY, AND TITLE VII'S CHARGE FILING PERIODS IN PARTICULAR, AND WOULD FRUSTRATE EMPLOYER COMPLIANCE EFFORTS

A. Title VII's Relatively Short Limitations Periods Are Intended To Encourage Prompt Resolution Of Charges

A principal objective of Title VII is to promote prompt and efficient resolution of discrimination claims. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) ("[i]n pursuing the goal of 'bring[ing] employment discrimination to an end,' Congress chose '[c]ooperation and voluntary compliance' as its 'preferred means'") (citation omitted); *see also W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983) (voluntary compliance is an "important public policy" intended by Congress to be the "preferred means of enforcing Title VII") (citation omitted). To further that aim, Congress deliberately set a relatively short period within which charges alleging Title VII violations must be filed. As this Court observed:

> By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination ... [I]n a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days – rather than months or years – we may not simply interject an

> additional ... period into the procedural scheme. We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

Mohasco Corp. v. Silver, 447 U.S. 807, 825-26 (1980) (footnote omitted); *see also Int'l Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976) ("Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight'") (citation and footnote omitted).[4]

The Court in *Mohasco* also recognized that in choosing Title VII's charge filing limitations period, Congress intentionally risked leaving some victims of discrimination without a remedy in order to avoid litigation of stale claims, reasoning that the choice "must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." 447 U.S. at 820. Thus, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is

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[4] The 1972 amendments to Title VII enlarged the limitations period from 90 to 180 days. 42 U.S.C. § 2000e-5(e).

the best guarantee of evenhanded administration of the law." *Id.* at 826.

1. Statutes of limitations discourage litigation of stale claims

Employers must be permitted to operate without the constant pressure that flows from the uncertainty over whether they will have to defend past employment decisions against challenges in the distant future. The purpose of statutes of limitations is to avoid precisely the prejudice to employers that results from defending stale claims.

Indeed, they are "designed to assure fairness to defendants" and to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965). The interest of an individual who fails to undertake the "minimal" step of filing a timely charge to preserve his or her Title VII claim must, therefore, give way to the interest of avoiding stale claims. *See Ricks*, 449 U.S. at 256-57 ("[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past") (citations omitted); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones").

2. Prompt filing of discrimination charges provides employers with opportunity to timely investigate and correct potential violations

In addition to triggering the EEOC's investigation process, a charge also serves the important purpose of providing employers with "fair notice that accusations of discrimination have been leveled against them and that they can soon expect an investigation from the EEOC." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 74 (1984). This early notice often operates as the employer's first warning of a potential workplace problem, and typically serves as the impetus for conducting an internal investigation into the matter. Where at the conclusion of such an investigation potential violations are uncovered, responsible employers make every effort to correct the problem and take steps to ensure it does not recur. Such efforts serve to advance Congress's desire that voluntary compliance be the "preferred means of achieving the objectives of Title VII." *See, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

An employer's earnest attempt to voluntarily comply with Title VII is severely hampered whenever an employee waits months or years to complain about suspected discrimination. As this Court observed in *Ricks*, "We recognize, of course, that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." 449 U.S. at 262 n.16. But here, as in *Ricks*, "there can be no claim" that Petitioner was not "abundantly forewarned." *Id.* Nor can

he claim ignorance of the applicable statute of limitations given his prior experience with invoking the complaint process.

B. Allowing Plaintiffs To Control When Limitations Run For Constructive Discharge Claims, Without Regard To When The Underlying Alleged Discriminatory Act Actually Occurred, Effectively Would Eliminate A Limitations Period For Such Claims

Affirming the decision below would encourage employees to report perceived discrimination more quickly – whether internally or externally with the EEOC. As relevant here, doing so would encourage more employees to report alleged discrimination prior to resigning, thereby allowing the employer an opportunity to promptly address and correct any issues and preserve the employment relationship. Such efforts further Title VII's goal of informal, cooperative resolution of disputes. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982) ("Title VII's primary goal, of course, *is* to end discrimination; the victims of job discrimination want jobs, not lawsuits") (footnote omitted).

Conversely, if the time for filing an administrative claim for constructive discharge does not begin to run until the employee ultimately resigns, he or she can (and would be incentivized to) take as long as the individual chooses to complain. The employee would have complete autonomy to decide when limitations would begin to run based upon when he or she eventually elects to quit. Allowing the claimant to determine when the limitations period starts to run could encourage, for instance, opportunistic plaintiffs to delay resigning, and put off bringing a constructive discharge claim, until after a scheduled bonus is paid, an

increase in salary is received, and/or another job is secured. Such action would have the potential to result in increased damages, should the claimant eventually prevail in his or her suit. *See Suders*, 542 U.S. at 147 n.8 (a constructive discharge plaintiff "is entitled to all damages available for a formal discharge[,]" including backpay and potential frontpay).

The potential for prejudice to employers is especially stark in the private sector, in which most individuals have up to 300 days to initiate administrative proceedings. If the limitations period for constructive discharge claims were extended as contemplated by Petitioner, an employer might not receive notice of an issue until a year or more after the relevant events actually occurred. Here, assuming the clock began to run when the settlement agreement was signed, Petitioner took more than twice the time statutorily allowed to lodge his complaint. In the private sector, that could equate to a 600-day delay. Moreover, extending the limitations period well beyond 300 days in cases involving constructive discharge would prejudice employers who reasonably have relied on EEOC regulations permitting employers to lawfully destroy employment records after one year, unless a charge has been filed. *See* 29 C.F.R. § 1602.14.

Inherent in Petitioner's argument is a theory completely contrary to the Title VII policy that favors limiting the life of claims. As noted, statutes of limitations serve to encourage parties to promptly assert their rights, and to avoid precisely the prejudice to employers that results from defending against stale claims. Yet, if this Court holds that the period for filing a constructive discharge claim runs from whenever the claimant ultimately elects to resign, regardless of when the allegedly discriminatory employment

actions occurred, employers indeed will be forced to defend against stale claims, and do so despite the fact that key documents may have been lawfully destroyed and key witnesses may be unavailable. In contrast, faithful adherence to Title VII limitations period conventions will encourage the prompt filing of constructive discharge claims, which in turn will promote prompt and effective remedial action. Indeed, the very nature of constructive discharge claims makes the principles enunciated time and again by this Court even more compelling. Unlike an actual discharge, in the case of a constructive discharge, "the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force." *Suders*, 542 U.S. at 148.

Under Petitioner's approach, any time an employee quits,[5] he or she would be free to file a charge purporting to transform the resignation into a constructive discharge relating back to allegedly discriminatory acts that occurred at any point months or even years prior to separation. While an employee ultimately might not be able to make out a viable case on the merits, the employer nevertheless will have expended significant time and expense to defend the claim.

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[5] The U.S. Department of Labor's Bureau of Labor Statistics (BLS) reported that, in July 2015 alone, there were 2.7 million "quits" in the United States, defined as "voluntary separations by employees (except for retirements, which are reported as other separations)." *See* News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, *Job Openings and Labor Turnover – July 2015* (Sept. 9, 2015), *available at* http://www.bls.gov/news.release/pdf/jolts.pdf (last visited October 2, 2015).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONER

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Cases

Adames v. Mitsubishi Bank Ltd.,
751 F. Supp. 1565 (E.D.N.Y. 1990) 19

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 1, 2, 10

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 10

American Airlines, Inc. v. Cardoza-Rodriguez,
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Brown v. Puget Sound Elec. Apprenticeship & Training Trust,
732 F.2d 726 (9th Cir. 1984) 4

Cavalier v. Clearlake Rehab. Hosp., Inc.,
306 F. App'x 104 (5th Cir. 2009) 16

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 1

Coffman v. Tracker Marine,
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Davidson v. Indiana-American Water Works,
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Del. State College v. Ricks,
449 U.S. 250 (1980) 10, 17, 18, 23

Draper v. Coeur Rochester, Inc.,
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Eatmon v. Bristol Steel & Iron Works, Inc.,
769 F.2d 1503 (11th Cir. 1985) 11

Fitzgerald v. Henderson,
251 F.3d 345 (2d Cir. 2001) 4

Flaherty v. Metromail Corp.,
235 F.3d 133 (2d Cir. 2000) 5, 19

Goss v. Exxon Office Sys. Co.,
747 F.2d 885 (3rd Cir. 1984) 3

Green v. Donahoe,
760 F.3d 1135 (10th Cir. 2014) 5

Green v. Harris Publ'ns, Inc.,
331 F. Supp. 2d 180 (S.D.N.Y. 2004) 16

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 1, 2

Hukannen v. Int'l Union of Operating Eng'rs, Hoisting & Portable Local
No. 101, 3 F.3d 281 (8th Cir. 1993) 5, 19

Hunt v. State of Dep't of Corrections,
297 F.3d 735 (8th Cir. 2002) 22

Int'l Bhd. Teamsters v. United States,
431 U.S. 324 (1977) 2

Johnson v. Runyon,
47 F.3d 911 (7th Cir. 1995) 5

Kimzey v. Walmart Stores, Inc.,
107 F.3d 568 (8th Cir. 1997) 22

Landrau-Romero v. Banco Popular de Puerto Rico,
212 F.3d 607 (1st Cir. 2000) 25

Lewis v. City of Chicago,
560 U.S. 205 (2010) 1

Love v. Pullman Co.,
404 U.S. 522 (1972) 4

Mayers v. Laborers' Health & Safety Fund,
478 F.3d 364 (D.C. Cir. 2007) 6, 18

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 2

Moore v. KUKA Welding Sys. & Robot Corp.,
171 F.3d 1073 (6th Cir. 1999) 17

Pa. State Police v. Suders,
542 U.S. 129 (2004) 3, 11, 20

Reedy v. Quebecor Printing Eagle, Inc.,
333 F.3d 906 (8th Cir. 2003) 17

Ricci v. DeStefano,
557 U.S. 557 (2009) 1

Rosier v. Holder,
833 F. Supp. 2d 1 (D.D.C. 2011) 19

Scott v. Lee Cty. Youth Dev. Ctr.,
232 F. Supp. 2d 1289 (M.D. Ala. 2002) 18

Serrano-Nova v. Banco Popular de Puerto Rico, Inc.,
254 F. Supp. 2d 251 (D.P.R. 2003) 19

Tawwaab v. Va. Linen Serv., Inc.,
729 F. Supp. 2d 757 (D. Md. 2010) 16

Webster v. Town of Warsaw,
66 F. Supp. 3d 706 (E.D.N.C. 2014)..... 16

Winder v. Postmaster Gen.,
528 F. App'x 253 (3d Cir. 2013) 4

Young v. Nat'l Ctr. for Health Servs. Research,
828 F.2d 235 (4th Cir. 1987) 5, 13, 18

Statutes and Regulations

29 C.F.R. § 1614.105(a)(1) 4

Title VII of the Civil Rights Act of 1964,

42 U.S.C. § 2000e-200e-17 .....*passim*

42 U.S.C. § 2000e-5(b)..... 10

42 U.S.C. § 2000e-5(e)(1)..... 4

Other Authorities

Annual Report on the Federal Work Force Part II, Workforce Statistics, Fiscal Year 2011, EEOC, http://www.eeoc.gov/federal/reports/fsp2011_2/upload/fsp2011_2.pdf..... 15

Beiner, Theresa M., *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 Wm. & Mary J. Women & L. 273 (2001)..... 12, 21, 24

Beiner, Theresa M., *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. Ark. Little Rock L. Rev. 117 (2001) 14

Brake, Deborah L. & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. Rev. 859 (2008) 15, 25

Brief of the EEOC as *Amicus Curiae* in Support of the Appellant, *Bailey v. United Airlines, Inc.*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245 ..... 11, 20, 24

Chamallas, Martha, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. Cal. L. Rev. 307 (2004) 14, 21

Davidson, Joe, *Report Shows Lack of Diversity in Top Civil Service ranks*, Wash. Post (Aug. 19, 2014) http://www.washingtonpost.com/politics/federal_government/report-shows-lack-of-diversity-in-top-civil-service 16

Kaiser, Cheryl R. & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 Law & Soc. Inquiry 801 (2006) 15

Keren, A. Hila, *Consenting Under Stress*, 64 Hastings L.J. 679 (2013) 15

Morgan, Phoebe A., *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 Law & Soc'y Rev. 67 (1999) 14

Race-Based Charges FY 1999 – FY 2014, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm 9

Shuck, Cathy, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 Berkeley J. Emp. & Lab. L. 401 (2002) 12, 14

Sex-Based Charges FY 1997 – FY 2014, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm 9

Sexual Harassment Charges EEOC and FEPAs Combined: FY 1997 – FY 2011, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm 9

Smith, Terry, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 Colum. Hum. Rts. L. Rev. 545 (2003) 15

INTEREST OF *AMICI CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization that, for more than seven decades, has fought to achieve racial justice and to ensure that America fulfills its promise of equality for all. To this end, LDF has litigated a range of employment discrimination cases in this Court, as well as the lower courts, appearing as counsel of record or *amicus curiae*. *See, e.g.*, *Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Since 1964, LDF has also worked ceaselessly to enforce Title VII, litigating on behalf of individual plaintiffs and plaintiff classes against private and public employers to challenge discriminatory employment practices in such cases as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), whose rulings were ultimately codified in the Civil Rights Act of 1991.

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace and has promoted voluntary compliance by employers with

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

federal and state civil rights laws. Securing equal opportunity for women requires not only the right to a workplace that is free from all forms of discrimination and exploitation, but also access to effective means of enforcing that right. NWLC has prepared or participated in the preparation of numerous *amicus* briefs in cases seeking to protect Title VII rights and the availability of effective means of enforcing them in this Court and in federal courts of appeals.

Given their expertise, NWLC and LDF believe their perspectives will help this Court resolve the issues presented by this case. *Amici curiae* urge the Court to reverse the Tenth Circuit's ruling and remand for further proceedings.

BACKGROUND

Title VII of the Civil Rights Act of 1964 was enacted to detect and eliminate discrimination in employment. Its "central statutory purpose [is] . . . eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle*, 422 U.S. at 421. *See also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977) (couching primary objective as "to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees") (citing *Griggs*, 401 U.S. at 427; *Albemarle*, 422 U.S. at 416). In order to achieve this goal, Title VII not only prohibits discriminatory employment practices that are express and direct, but also those that are subtle and indirect. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("Title VII tolerates no racial discrimination, subtle or otherwise.").

The doctrine of constructive discharge is a key component of Title VII's anti-discrimination mandate. "The constructive discharge concept originated in the labor-law field in the 1930's," in the face of intolerable working conditions experienced by employees who engaged in union activity. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004) (citations omitted). "Over the next two decades, Courts of Appeals sustained NLRB [National Labor Relations Board] constructive discharge rulings." *Id.*

"By 1964, the year Title VII was enacted, the doctrine [of constructive discharge] was solidly established in the federal courts." *Id.* at 142 (citation omitted). Since then, the circuits "have recognized constructive discharge claims in a wide range of Title VII cases," including claims involving discrimination and harassment based on race, pregnancy, national origin, sex, and religion. *Id.* (collecting cases). *See also id.* ("[A]pplication of the constructive discharge doctrine to Title VII cases has received apparently universal recognition among the courts of appeals.") (citing *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887 (3rd Cir. 1984)).

Today, the basic contours of a constructive discharge claim are well-settled: "the plaintiff . . . must show that the abusive working environment became so intolerable that [his or] her resignation qualified as a fitting response." *Suders*, 542 U.S. at 134. Before a court may consider a Title VII claim, a plaintiff generally must first seek redress through

administrative channels.[2] In the private sector, employees must file administrative charges with the U.S. Equal Employment Opportunity Commission (EEOC) within 180 or 300 days of an alleged unlawful employment practice.[3] Federal employees "must initiate contact with [an EEOC] Counselor within 45 days of the date of the matter alleged to be discriminatory. . . ." 29 C.F.R. § 1614.105(a)(1). While other deadlines and requirements apply to other parts of the process, the 45-day period applicable to federal employees effectively operates as a statute of limitations.[4]

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[2] *See generally Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 729 (9th Cir. 1984) ("Title VII places primary responsibility for disposing of employment discrimination complaints with the EEOC in order to encourage informal conciliation of employment discrimination claims and foster voluntary compliance with Title VII . . . . Title VII plaintiffs must therefore exhaust their administrative remedies before seeking judicial relief from discriminatory action."); *see also Love v. Pullman Co.*, 404 U.S. 522, 527 (1972) (finding that administrative procedures form part of a system "in which laymen, unassisted by trained lawyers, initiate the process").

[3] In the private sector, "[a] charge . . shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred," or, if state proceedings are also initiated, "within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier." 42 U.S.C. § 2000e-5(e)(1) (Title VII).

[4] *See Winder v. Postmaster Gen.*, 528 F. App'x 253, 255 (3d Cir. 2013) (unpublished) ("This 45–day time limit operates akin to a statute of limitations."); *Fitzgerald v. Henderson*, 251 F.3d

With respect to constructive discharge claims, the circuits disagree about when this 45-day limitations period begins to run. A majority of circuits have held that the filing period begins to run on the date of the employee's resignation, with some courts reasoning that the resignation itself constitutes the employer's last discriminatory act (hereinafter, "Date-of-Resignation Rule").[5] A minority of circuits, including the Tenth Circuit in this case, have held that the employer's last discriminatory act triggers the relevant filing period (hereinafter, "Last Discriminatory Act Standard").[6]

345, 359 (2d Cir. 2001) ("The 45-day period serves as a statute of limitations."); *Johnson v. Runyon*, 47 F.3d 911, 917 (7th Cir. 1995) ("This deadline is construed as a statute of limitations.").

[5] *See Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000) ("[T]he date of discharge triggers the limitations period in a constructive discharge case, just as in all other cases of wrongful discharge."); *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 123 (1st Cir. 1998) (holding that the filing period begins to run from the date of an employee's formal resignation); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998) ("[I]n constructive discharge cases periods of limitation begin to run on the date of resignation."); *Hukannen v. Int'l Union of Operating Eng'rs, Hoisting & Portable Local* No. 101, 3 F.3d 281 (8th Cir. 1993) (holding that a forced resignation itself constitutes the employer's last discriminatory act); *Young v. Nat'l Ctr. for Health Servs. Research*, 828 F.2d 235, 238 (4th Cir. 1987) ("[R]esignation is a constructive discharge – a distinct discriminatory 'act' for which there is a distinct cause of action.").

[6] Three circuits have adopted the minority position. *See Green v. Donahoe*, 760 F.3d 1135, 1137 (10th Cir. 2014) (finding that employee did not exhaust his administrative remedies because

SUMMARY OF ARGUMENT

In our civil legal system, statutes of limitations and filing deadlines function to strike a careful balance between upholding principles of equity and access to justice on one hand, and fostering finality and clarity on the other. That equilibrium is especially important in the context of civil rights laws that combat discrimination and are intended to be navigated by laypersons, unaided by an attorney. The Tenth Circuit's position has upset this careful balance.

The immediate question here is when the 45-day filing period in which federal employees are required to report workplace discrimination commences. But the broader issue is whether the Court should maintain the clear, simple Date-of-Resignation Rule that is already embraced by the majority of circuits – or whether it should instead shift to the unworkable Last Discriminatory Act Standard which erects an unnecessary procedural barrier to the fair adjudication of workplace discrimination and harassment claims. Title VII, precedent, and prudence counsel in favor of the former approach for two overarching reasons.

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the filing period for a constructive discharge claim begins to run on the date of the employer's "last misconduct"); *Mayers v. Laborers' Health & Safety Fund*, 478 F.3d 364, 368 (D.C. Cir. 2007) (per curiam) (applying Last Discriminatory Act Standard and dismissing a constructive discharge claim under the ADA as untimely); *Davidson v. Indiana-American Water Works*, 953 F.2d 1058, 1059 (7th Cir. 1992) (holding that the filing period for a claim of constructive discharge is triggered on the date that an employer "takes some adverse personnel action" against an employee).

First, considerable experience in tackling employment discrimination augurs in favor of a clearly demarcated filing period for constructive discharge claims. As part of Title VII's mandate to eradicate discrimination in the economy, the law encourages employers and employees to reach mutual understandings and work together to overcome prejudice. The Date-of-Resignation Rule is clear and accomplishes the important goal of encouraging private resolution: because the filing period does not begin until an employee has resigned, it allows the employee to explore internal channels before engaging in litigation. This rule therefore recognizes that employees who suffer discrimination should have the time to weigh their employment options and consider the various professional and personal consequences – like the need to support their families, pay rent, and meet other financial obligations – before quitting and initiating litigation. The case law confirms that this simpler rule has proven to be administrable and advisable across a variety of situations, including cases of racial and gender discrimination and sexual harassment.

Second, there are real problems with the Tenth Circuit's Last Discriminatory Act Standard. It is unwieldy and innately indeterminate, particularly since it is often unclear – in the midst of a series of discriminatory measures – which particular act is the "last" one. Moreover, it is unfair and implausible to expect a layperson to recognize that the filing period commences before the employee has resigned or could be considered "constructively discharged" as a matter of law. And for those employees that do properly identify the trigger date, the Last Discriminatory Act Standard encourages snap decision-making, contrary to Title VII's goal of fostering conciliation. This

standard not only needlessly injects complexity into what should be a straightforward statute of limitations determination, in some instances, it also puts employees in a hazardous Catch-22, whereby resigning and remaining employed both involve legal pitfalls.

The Tenth Circuit's primary defense for this standard turns on the mistaken premise that employees may indefinitely delay their claims and it overlooks the fact that employers have a strong incentive – and considerably more power – to drag their feet and run out the clock.

The ultimate consequence of the Tenth Circuit's standard is stark: in just over one traditional pay cycle, employees could scramble to resolve serious issues of discrimination or harassment and still miss their one opportunity at relief. This is unjust and unnecessary. Employees already confront significant obstacles to proving constructive discharge, with cases involving the most odious racial slurs routinely discarded at the summary judgment stage. There is no basis for contorting the statute of limitations period such that constructive discharge claims are rendered functionally unavailable. Instead, this Court should ratify the simple and fair Date-of-Resignation Rule that a majority of circuits have already implemented and found to be readily administrable.

ARGUMENT

I. EXTENSIVE EXPERIENCE IN COMBATING EMPLOYMENT DISCRIMINATION DEMANDS A CLEAR, SIMPLE FILING PERIOD FOR CONSTRUCTIVE DISCHARGE CLAIMS.

Racial discrimination and harassment in the workplace remain serious problems for individual employees and the labor market as a whole.[7] Likewise, sexual harassment and gender discrimination are disconcertingly prevalent in the economy.[8] Thus, despite this country's real progress towards inclusion and equality in employment, the strong protections of Title VII remain as important as ever.

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[7] *See generally Race-Based Charges FY 1999 – FY 2014*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm (last visited July 7, 2015) (summarizing the total number of charges filed and resolved under Title VII alleging race-based discrimination).

[8] *See generally Sex-Based Charges FY 1997 – FY 2014*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm (last visited July 7, 2015) (summarizing the total number of charges filed and resolved under Title VII alleging sex-based discrimination); *Sexual Harassment Charges EEOC and FEPAs Combined: FY 1997 – FY 2011*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited July 7, 2015) (summarizing the total number of charges filed and resolved under Title VII alleging sexual harassment discrimination).

LDF and NWLC share more than a century of experience fighting for civil rights. That litigation record, combined with our practical experience in the field of employment law, confirms that a straightforward and comprehensible rule to determine when the statute of limitations begins to run – like an employee's resignation date – is necessary for Title VII to achieve its goal of eliminating unlawful discrimination in the workplace.

A. Practice and Policy.

As this Court made clear in *Ricks*, "limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Del. State College v. Ricks*, 449 U.S. 250, 262 n.16 (1980). In the context of constructive discharge law, the Date-of-Resignation Rule offers a straightforward statute of limitations trigger date that comports with the objectives of Title VII.

The goal of Title VII is to eliminate discrimination in the workplace. *See, e.g., Albemarle*, 422 U.S. at 421 (asserting Title VII's "central statutory purpose [is] . . . eradicating discrimination throughout the economy"). The statute seeks to achieve that objective by, *inter alia*, promoting policies of conciliation, mediation, and non-litigation remedies in order to encourage employers and employees to work together to achieve mutual understandings and overcome discrimination. *See* 42 U.S.C. § 2000e-5(b) ("[T]he Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."); *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (finding "cooperation and

voluntary compliance were selected as the preferred means for achieving [the] goal[s]" of Title VII); *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1509 (11th Cir. 1985) ("[T]he legislative history of Title VII indicate[s] that Congress intended Title VII to be enforced primarily through conciliation and voluntary compliance.").

The Date-of-Resignation Rule advances these goals by incentivizing employees to explore such options as mediation and other internal channels before resorting to litigation. Conversely, the Last Discriminatory Act Standard encourages employees to forgo or fast-forward informal resolution efforts and lodge a formal legal claim as early as possible, since the filing period begins to run before there has been a resignation or "constructive discharge" as defined by law. Indeed, the EEOC has confirmed that the Date-of-Resignation Rule better promotes careful and considered decision-making by employees. *See* Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Support of the Appellant (hereinafter "EEOC *Bailey Amicus*"), *Bailey v. United Airlines*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245 at *12 (Mar. 26, 2001) ("Employees are free to file charges with the Commission when they feel that they have been subjected to unlawful discrimination. An employee, however, should not have his hand forced before a claim has ripened.").

The courts have also recognized the value of having employees stay in their jobs while informally resolving employment disputes and mitigating damages – even in the face of prospective retaliation. For example, this Court in *Suders* held that, when a discrimination claim does not hinge on a "tangible

employment action," employers may avail themselves of the *Ellerth/Faragher* defense, whereby the employer must show that "(a) [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (b) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." 542 U.S. at 129.[9]

The Date-of-Resignation Rule is also prudent in practice. In some instances, the date of resignation

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[9] Furthermore, circuit splits have developed as to whether constructive discharge doctrine requires an employee to complain to higher management prior to resigning. *See generally* Brief of *Amicus Curiae* for the National Employment Lawyers Association (identifying circuit splits). In other ways, the pressures to stay in the workplace can be problematic, and give rise to an impossible situation for employees, *infra* at 13-15. *Compare Coffman v. Tracker Marine*, 141 F.3d 1241, 1247 (8th Cir. 1998) ("[S]ociety and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships.") (citation and internal quotation marks omitted) *with* Cathy Shuck, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 Berkeley J. Emp. & Lab. L. 401, 430 (2002) ("[R]equiring a plaintiff to mitigate her damages by remaining in a discriminatory environment is contrary to Title VII's rules for post-termination mitigation of damages."); *and* Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 Wm. & Mary J. Women & L. 273, 335 (2001) ("By overemphasizing preventive efforts, the Court ignores deterrence through damages and compensation (making victims whole) as other important goals of Title VII.").

and the date of the last discriminatory act are the same day. *See* Pet. Merits Br. 32. And, as detailed below, *infra* at 18-20, several courts have found the resignation itself constitutes the employer's last discriminatory act. *See e.g., Young*, 828 F.2d at 237-38; *supra* n.5 (discussing the position of the majority of circuits).

In other instances, employees need, and should have, sufficient time to weigh their options and any personal and professional consequences. The Date-of-Resignation Rule recognizes this basic reality by beginning the statute of limitations only after an employee has gone through that process and decided to resign, whereas the Last Discriminatory Act Standard truncates these considerations by starting the statute of limitations after a very brief period of time which is not likely to allow for meaningful internal negotiation or consideration of alternatives. It is particularly important for employees facing racial, gender and/or sexual harassment to duly consider their options, for two notable reasons.

First, like all people of good faith, employees facing discrimination and harassment struggle in earnest to make the best of a bad situation. This can involve an effort to resolve problems with the existing (discriminatory) managers or colleagues, only to later learn that resolution is difficult or impossible to achieve. Whether formal or informal, these internal processes and means of addressing discrimination in the workplace can be protracted and involved. And it is often the employer's failure to reasonably respond to concerns raised through these internal processes that makes resignation the only meaningful option.

The stakes involved in a decision to resign are often enormous for the personal life, economic livelihood,

and professional trajectory of the employee. In practice, employees need to gauge their ability to provide for their families, assess the availability of continuing health care, and determine their ability to pay rent before deciding to resign. *See, e.g.*, Shuck, *supra* n.9, at 428 ("Given the plaintiff's job position, or age, or gender, or race, or previous work experience, or any of a myriad of other factors, perhaps a 'reasonable' response would be to keep a low profile, or simply abandon the situation."). Many fear that, even if they are legally protected from retaliation, a formal report of discrimination functionally terminates the employment relationship.[10] Given this reasonable fear, particularly in discriminatory and hostile work environments, employees often resign first and then seek EEOC assistance. *See* Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. Cal. L. Rev. 307, 310-11 (2004) ("[E]mployees are reluctant to sue their current employer and will often file a claim only after they have left their job.") Moreover, social science confirms that a whole range of personal and psychological

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[10] *See* Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 Law & Soc'y Rev. 67, 75 (1999) (recounting survey of female employees that "job loss, or fear of it, was the primary consideration for a serious consideration of litigation"); Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. Ark. Little Rock L. Rev. 117, 124-25 (2001) ("[O]nce an employee complains about discrimination on the job, he or she can usually consider that employment relationship over.").

pressures bear upon an individual who must decide whether to immediately quit or report discrimination.[11] A Date-of-Resignation Rule is best suited to address these circumstances.

These pressures are especially acute for federal employees, who face one of the shortest statutes of limitations in employment law. And while the federal sector now employs large numbers of women and racial minorities,[12] it still grapples with a significant number of discrimination claims.[13]

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[11] *See* A. Hila Keren, *Consenting Under Stress*, 64 Hastings L.J. 679, 711-13 (2013) (explaining that race and racism have a significant impact on how individuals experience stress and can trigger changes in cognition, behavior, and sociological perceptions of helplessness in certain workplace conditions); Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 Colum. Hum. Rts. L. Rev. 545, 547 (2003) (summarizing studies which found that working-class African Americans facing discrimination experience higher stress and blood pressure and sometimes accept unfair treatment as a fact of life); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 896-901 (2008) (summarizing social science on women's responses to harassment, the social cost of complaining, and why some employees are reluctant to challenge discrimination); Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 Law & Soc. Inquiry 801, 804 (2006) (discussing studies and surveys showing that "minimization bias" leads women and people of color experiencing discrimination to resist acknowledging it as such and to fear being perceived as hypersensitive troublemakers).

[12] *See e.g.*, *Annual Report on the Federal Work Force Part II, Workforce Statistics, Fiscal Year 2011*, EEOC, http://www.eeoc.gov/federal/reports/fsp2011_2/upload/fsp2011_2.

Second, because it is already difficult to bring a successful constructive discharge claim, the statute of limitations period should not make it any harder. Laboring under what is supposed to be a system for laypersons, employees face a number of disconcerting obstacles to having their claims heard on the merits. For example, constructive discharge claims involving the most heinous racial slurs are routinely jettisoned, often at the summary judgment stage, on the dubious ground that the slurs were not unbearable *enough*.[14]

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pdf (last visited July 7, 2015) (finding that women and racial minorities comprise 43.8 percent and 34.8 percent of the federal workforce, respectively).

[13] *See, e.g.*, Joe Davidson, *Report Shows Lack of Diversity in Top Civil Service Ranks*, Wash. Post (Aug. 19, 2014) http://www.washingtonpost.com/politics/federal_government/report-shows-lack-of-diversity-in-top-civil-service-ranks/2014/08/19/372a1130-27c8-11e4-86ca-6f03cbd15c1a_story.html (describing role of discrimination and retaliation).

[14] *See Cavalier v. Clearlake Rehab. Hosp., Inc.*, 306 F. App'x 104, 106, 107 (5th Cir. 2009) (unpublished) (concluding co-worker's repeated use of the term "boy" and threat to "beat the tar off of" the plaintiff were not sufficiently hostile or intolerable); *Tawwaab v. Va. Linen Serv., Inc.*, 729 F. Supp. 2d 757, 766, 774, 776, 783-84 (D. Md. 2010) (finding that statements "black motherfucker" or "black bastard" and co-workers displaying of monkey statue while stating "This is what I think of you. You are monkeys to me," were insufficient to support constructive discharge claim); *Green v. Harris Publ'ns, Inc.*, 331 F. Supp. 2d 180, 192, 195 (S.D.N.Y. 2004) (finding co-worker's statements in reference to a rumor employer was looking for a "token nigger" were not intolerable); *see also Webster v. Town of Warsaw*, 66 F. Supp. 3d 706, 709-10 (E.D.N.C. 2014) (granting motion to dismiss on the grounds that

Moreover, the inconsistent application of the law around constructive discharge has created disjointed and unfair circuit splits as to whether essentially identical, discriminatory messages constitute a constructive discharge. *Compare Reedy v. Quebecor Printing Eagle, Inc.*, 333 F.3d 906, 909-10 (8th Cir. 2003) (concluding that bathroom graffiti associated directly with plaintiff, such as "kill all niggers," "coon," and "all niggers must die," was insufficient to make out a constructive discharge claim) *with Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1077, 1080 (6th Cir. 1999) (concluding that bathroom graffiti, such as "kill all niggers," was sufficient to show that conditions were so intolerable that a reasonable person would quit).

B. Supporting Case Law.

The case law confirms that a simple filing period, rooted in an employee's unambiguous resignation, is more administrable and advisable across a range of scenarios. Indeed, the bulk of the circuits – five out of eight – have already reached this reasoned conclusion and held that the filing period begins to run on the date of the employee's resignation. *See supra* n.5.[15]

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the repeated use of "boy" directed at the police chief was offensive but not intolerable).

[15] The origins of the circuit split in this case further demonstrate that the Date-of-Resignation Rule is more consistent with this Court's jurisprudence. The split arose in the early 1990s, largely over divergent understandings of *Ricks*, which involved a scholar who was denied tenure and offered a terminal one-year contract. In *Ricks*, this Court ruled that the limitations period began to run when the employee was offered

Moreover, even under the Tenth Circuit's "last discriminatory act" view, some courts have ruled that an employee's resignation is itself the operative "discriminatory act." For instance, the Fourth Circuit held that when an employee is constructively discharged, his or her resignation itself is "a distinct discriminatory 'act' for which there is a distinct cause of action," and from which to measure the applicable administrative deadlines. *Young*, 828 F.2d at 237-39 (reversing lower court ruling).

In the context of racial discrimination, lower courts have also used the date of resignation as the relevant benchmark in a variety of constructive discharge cases. *See e.g.*, *Scott v. Lee Cty. Youth Dev. Ctr.* 232 F. Supp. 2d 1289, 1295 (M.D. Ala. 2002) (adopting "the uniform rule" that the "filing period is measured from the date the employee gives notice of his intent to resign" because "in a constructive discharge case only the employee can know when the atmosphere has been made so intolerable that he must leave" due to

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the terminal contract, rather than one year later, when the contract expired. *Ricks*, 449 U.S. at 261-62. Early on, several circuits – namely the Fourth, Eighth, and Ninth – read *Ricks* as supporting the Date-of-Resignation Rule because the resignation was functionally equivalent to *Ricks*' discharge (his denial of tenure). But later, the Last Discriminatory Act Standard emerged when the Seventh Circuit compared an employee's resignation to the mere "consequences" of the employer's original discrimination and therefore concluded it was irrelevant for purposes of commencing the statute of limitations. *Davidson*, 953 F.2d at 1059 (7th Cir. 1992) (filing period triggered when employer "takes some adverse personnel action"). Only one other court, beyond the Tenth Circuit, adopted the minority view. *Mayers*, 478 F.3d at 369-70.

racially hostile work environment); *Adames v. Mitsubishi Bank Ltd.*, 751 F. Supp. 1565, 1570 (E.D.N.Y. 1990) (measuring the filing period for an EEOC claim "from the date the employee gave notice of her intent to resign" in a race and national origin discrimination case); *see also Rosier v. Holder*, 833 F. Supp. 2d 1, 7 (D.D.C. 2011) (discussing why the ongoing nature of hostile conduct that gave rise to a constructive discharge claim makes the reporting timeline more expansive); *Serrano-Nova v. Banco Popular de Puerto Rico, Inc.*, 254 F. Supp. 2d 251, 262 (D.P.R. 2003) (finding that a resignation that constitutes a constructive discharge constitutes a discriminatory act, but holding that, given a delay in that case between the discriminatory act and resignation, the plaintiff could not use her resignation as an "anchor" for earlier acts).

Likewise, when confronting gender discrimination and sexual harassment, many courts have adopted the Date-of-Resignation Rule. *See, e.g.*, *Flaherty*, 235 F.3d at 138 (concluding, in a constructive discharge claim based on age and sex discrimination, that the accrual date "was the date when [plaintiff] gave definite notice of her intention to retire, and the rule should be the same in all cases of constructive discharge"); *Draper*, 147 F.3d at 1111 (finding, in Title VII action alleging hostile work environment, constructive discharge, and sexual harassment, that the date of discharge triggers the limitations period); *Hukannen*, 3 F.3d at 285 (holding, in a sexual harassment claim, that "[w]hen Title VII violations are continuing in nature, the limitations period" does not run until the employee's constructive discharge, which also constitutes "the last occurrence of discrimination").

The use of the Date-of-Resignation Rule in the cases described above is particularly effective given the unique nature of a constructive discharge, where the employee's decision to resign is a crucial element of the cause of action. Indeed, this Court has made clear that the employer's acts prior to the employee's resignation constitute merely "precipitating conduct" leading up to the key constituent element of the claim: the employee's resignation. *Suders*, 542 U.S. at 148 ("A constructive discharge involves *both* an employee's decision to leave *and* precipitating conduct.") (emphasis added).

The EEOC has also endorsed the Date-of-Resignation Rule, filing an *amicus* brief in support of the rule in the Third Circuit. *See* EEOC *Bailey Amicus*, *supra*, at *12. Drawing upon precedent from the First, Second, Fourth, and Ninth Circuits, the EEOC concluded that the "operative date" for the filing window was "the date on which the employee acts on the option under the terms specified by the employer." *Id.* at *10. The EEOC also explained that "[t]his approach to the timeliness issue is fully compatible with the Supreme Court's decision in *Ricks*," *id.* at *10, and most faithful to the policies undergirding Title VII, *id.* at *12.

II. THE "LAST DISCRIMINATORY ACT" STANDARD IS UNWIELDY, UNFAIR, AND CONTRARY TO THE PURPOSES OF TITLE VII.

In contrast to the many advantages of the Date-of-Resignation Rule, the Tenth Circuit's Last Discriminatory Act Standard is needlessly unwieldy and unfair, and cannot be fairly administered. In some instances, the Last Discriminatory Act Standard may place employees in a perilous Catch-

22, in which both resigning from, and remaining in, an employment position may impose obstacles to challenging discrimination. The Last Discriminatory Act Standard should therefore be rejected by this Court.

First, the standard itself is inherently nebulous. Whether the last "act" includes a resignation itself is disputed among the circuit courts, *see supra* at 5 nn.5-6 (discussing circuit split). Moreover, the "last discriminatory act" is often not immediately clear, particularly when a series of discriminatory, retaliatory, or harassing acts give rise to the constructive discharge. *See, e.g.*, *Draper*, 147 F.3d at 1107 (finding that "persistent harassment" and disparate treatment over two years, rather than a particular instance, gave rise to the constructive discharge). In the heat of the moment, it can be difficult to ascertain whether a particular act is the "last" one, let alone whether a court would consider it to be independently or aggregately actionable. *See* Beiner, *supra* n.9, at 331 ("Harassment victims should not be summarily dismissed for initially failing to report or delaying reporting until the incidents are repeated or become more severe. Indeed, expecting immediate reporting is counter-intuitive, especially given that the sexual harassment might not yet have reached an actionable level or a level that the victim believes she can no longer handle.").

This is particularly true when lower courts have drawn fuzzy – and sometimes indecipherable lines – between a work environment that is hostile but somehow bearable and another that is hostile but intolerable. *See* Chamallas, *supra*, at 316 ("Factfinders are thus called on to make fine

calibrations of the magnitude of the harassment faced by the plaintiff, implicitly judging between harassment that is bad enough to amount to a change in working conditions for the plaintiff (the 'severe or pervasive' standard for hostile environments), but not bad enough to justify plaintiff quitting her job (the 'intolerable' standard for constructive discharge)."). *See supra* at 17 (discussing circuit splits regarding similar racial slurs and death threats inscribed in bathroom).

These determinations will be further complicated in cases where the employer's ongoing failure to address discrimination in the workplace forces an employee's resignation, as a "last act" standard does not easily map on to discrimination that is perpetuated based on an employer's failure to remedy a hostile environment. *See, e.g., Kimzey v. Walmart Stores, Inc.*, 107 F.3d 568, 575 (8th Cir. 1997) (allowing constructive discharge claim to go to the jury based on employer's inaction in the face of complaints of sexual harassment); *Hunt v. State of Mo. Dep't of Corrections*, 297 F.3d 735, 744 (8th Cir. 2002) (same). The victimized employee should not bear the burden of parsing each encounter with the employer to determine which act would constitute the legally acceptable "last straw" in the employer's discriminatory conduct.

The lack of clarity in the Tenth Circuit's standard injects an unnecessary degree of complexity into what can and should be a straightforward statute of limitations determination. As a result, the standard incentivizes frontloading needless and onerous substantive questions into mini-trials about whether an employer's acts were, or were not, part of a

discriminatory course of conduct and when the last discriminatory act took place.

Additionally, the Tenth Circuit's Last Discriminatory Act Standard creates a real risk of unfairness by placing artificial barriers to enforcement of the civil rights laws. *Ricks* rightly warned against the dangers of making it "difficult for a layman to invoke the protection of the civil rights statutes." 449 U.S. at 262 n.16. The Last Discriminatory Act Standard imposes just this kind of difficulty because it is profoundly counterintuitive to ask laypersons to recognize that the clock has begun to run on their constructive discharge claim before they have resigned and, thus, before they have a constructive discharge claim as a matter of law. *See also* Merits Br. 32-34. It is simply unrealistic to expect employees facing hostile work environments and weighing their options to calculate, in real-time, when the "last discriminatory act" may have occurred and when the 45-day clock may start running.

Furthermore, in some parts of the country, employees facing a constructive discharge may also find themselves in a Catch-22. The circuit courts are split as to whether employees must complain to higher management prior to resigning.[16] Thus, in

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[16] *See generally* Brief of *Amicus Curiae* for the National Employment Lawyers Association (identifying circuit splits). While the Court need not resolve that split in this case, it should be aware that there are serious problems with how some courts have required the use of internal grievance procedures. *See also supra* n.9 (discussing how overemphasis of mitigation of

some circuits, employees who quit immediately after an employer's discriminatory act are more likely to meet the 45-day filing deadline, but risk rejection of their claim for failure to utilize their employers' internal remedies to address the complained of discrimination – while those who stay in their jobs after a discriminatory act and try to resolve matters internally risk missing the filing deadline.[17] This is patently unworkable in a system for federal employees, who are laypersons working around a condensed, 45-day filing period.

Ultimately, the repercussions of the Last Discriminatory Act Standard frustrate the central purposes of Title VII altogether, *supra* at 10. As the EEOC has previously explained, incentivizing snap decisions and a rush to adversarial processes is counter to the spirit of Title VII. Rather, it is important to ensure that employees are "not rushed into the filing of an EEOC charge" as they carefully weigh considerations. *See* EEOC *Bailey* Amicus, *supra*, at *2.

In the face of this onslaught of practical problems that attend the Last Discriminatory Act Standard, the Tenth Circuit's holding hinges on the dubious premise that a simple Date-of-Resignation Rule

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damages and requiring employees to stay in discriminatory workplace is contrary to the aims of Title VII).

[17] *See also* Beiner *supra* n.9, at 331 (noting that harassment victims can be "caught in a difficult catch twenty-two."); Brake &. Grossman, *supra* n.11, at 886 (explaining that the "time spent trying to resolve discrimination complaints internally seriously jeopardizes employees' formal assertion of rights").

somehow leads employees to game the system by delaying their resignation, thus controlling the timing of their claims. But an employee who indefinitely delays resignation without rationale is unlikely to succeed on the merits of a constructive discharge claim. *See Landrau-Romero v. Banco Popular De Puerto Rico*, 212 F.3d 607, 613 (1st Cir. 2000) ("If a plaintiff does not resign within a reasonable time period after the alleged harassment, he was not constructively discharged."); *Draper*, 147 F.3d at 1110 n.2 (noting "[t]he frequency and freshness of the instances of harassment" affects any adjudication on the merits). For this reason alone, employees are unlikely to manipulate a Date-of-Resignation Rule to their benefit.

Moreover, the notion that the filing period must be constructed to discourage employees from sitting on their claims ignores the fact that a Last Discriminatory Act Standard gives *employers* a strong incentive to delay internal administrative processes that an employee may turn to first in order to address discrimination – as well as the fact that employers have considerable power to delay the process. "Employers have a great deal of control over the length of time such processes take, whether employees use them, and the extent of employees' reliance on and hopes for such processes," and "it is all too easy for such internal processes to run out the clock on asserting rights through the formal statutory mechanisms." Brake & Grossman, *supra* n.11, at 886.

For all these reasons, the Date-of-Resignation Rule would best address these concerns by providing a date certain on which both employers and employees can rely while best serving the aims of Title VII.

CONCLUSION

The standard adopted by the Tenth Circuit presents a serious procedural barrier to the adjudication of workplace discrimination and harassment claims and may prevent aggrieved federal employees from receiving appropriate relief. The Court should adopt a simple, fair, and administrable rule, as the majority of the circuits have implemented. For the foregoing reasons, this Court should reverse and remand.

Respectfully submitted,

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No. 14-613

In The
Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN,
Postmaster General, United States Postal Service,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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INTEREST OF AMICUS

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.[1]

SUMMARY OF ARGUMENT

The court of appeals acknowledged that a resignation by the plaintiff is an element of a constructive discharge claim. That is largely dispositive of the

[1] Counsel for petitioner and respondent have consented to the filing of this brief. Copies of their letters of consent are being filed with the Court. Neither party authored the brief in whole or in part or made any monetary contribution to fund the preparation or submission of the brief.

issue before the Court. Absent unusual circumstances, the limitations period for a claim does not begin to run until all the elements of the claim exist. There is no persuasive reason for departing in this case from that normal rule.

There are a number of important circuit conflicts regarding the other elements of a constructive discharge claim. The courts of appeals disagree about whether in such a case the plaintiff must prove that the employer intended to force the worker to resign. Those courts differ as well regarding whether a plaintiff is required, prior to resigning, to complain to some higher company official – other than that particular official who violated Title VII – about the violation triggering his or her resignation.

Those issues, however, are not presented by this appeal. The Court in resolving the instant case should avoid language which the lower courts might misunderstand as addressing either of those circuit conflicts.

ARGUMENT

I. THE LIMITATIONS PERIOD FOR A CONSTRUCTIVE DISCHARGE CLAIM DOES NOT BEGIN TO RUN UNTIL THE WORKER RESIGNS

The court of appeals erred in holding that the statute of limitations for a constructive discharge action begins to run, and can even expire, before the

worker has resigned. *See Mac's Shell Service, Inc. v. Shell Oil Products Co.*, 559 U.S. 175, 184 (2010) ("To recover for constructive discharge, however, an employee generally is required to quit his or her job."). The court below correctly acknowledged that a worker's resignation is an element of a constructive discharge claim. Pet.App. 22a. As petitioner explains, under ordinary circumstances a limitations period for a cause of action does not begin to run until all elements of that claim exist. Pet.Br. 14-17 Nothing about the statute or regulation at issue in this case warrants a departure from that general rule.

Interpreting Title VII and the applicable regulation in this manner is strongly supported by the very nature of a constructive discharge claim. The touchstone of such a claim is the manner in which a reasonable person in the circumstances of the plaintiff would respond to the employer's unlawful actions. An employee who resigned was constructively discharged if a reasonable person would quit.[2] The governing limitations standard should be consistent with the expectations of a reasonable employee. Most workers would think that the time to complain about being forced to resign is after they have actually resigned, not weeks or months earlier when they are trying to decide whether or not to do so. The standard adopted

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[2] Reasonable workers might, of course, respond differently to the same unlawful actions; some workers may be so fiercely determined that they will put up with treatment that would cause most other employees to resign.

by the Tenth Circuit is one which, even if endorsed by this Court, will necessarily remain unknown to employees, who at the charge-filing stage will almost never be represented by counsel. Such an early limitations period will not shape the actions of uninformed claimants – although it might of course affect the tactics used by employers. Particularly in this context, plaintiffs should not be penalized for acting in the manner that would be typical of a reasonable person in their circumstances.[3]

II. THE COURT SHOULD NOT RESOLVE THE CIRCUIT CONFLICT REGARDING WHETHER IN A CONSTRUCTIVE DISCHARGE CASE THE PLAINTIFF MUST PROVE THAT THE EMPLOYER INTENDED TO FORCE THE WORKER TO RESIGN

There is a longstanding circuit conflict regarding whether the plaintiff in a constructive discharge case must prove that the employer specifically intended its

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[3] *See Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 402-03 (2008):

> In the administrative context...it appears pro se filings are the rule, not the exception. The ADEA, like Title VII, sets up a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 124 (1998)....The systems must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes.

discriminatory or retaliatory actions to force the worker to resign. The court of appeals below described constructive discharge claims in terms that implied that such claims are recognized to prevent, and thus might be limited to, instances in which an employer seeks to force a worker to resign in order to evade the prohibition against unlawful dismissals.[4] This Court should avoid such characterizations, and leave this issue for resolution in another case.

1. The First, Third, Fifth, Ninth, Tenth, Eleventh and District of Columbia Circuits reject this specific intent requirement.

The First Circuit rejected the requirement in *Ramos v. Davis & Geck,* 167 F.3d 759, 732 (1st Cir. 1999). "[Defendant] argues that the imposition of objectively oppressive work conditions should not suffice to establish a constructive discharge without proof that the employer created the intolerable work conditions with the specific intent of forcing the employee to resign. Such a requirement of proof of employer intent would plainly be at odds with our settled precedent...." *Ramos* explained that this intent

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[4] "But employers should not be able to escape...remedies [for discriminatory dismissal] simply by making the job so intolerable that the employee resigns, making it unnecessary to fire him. *See* 1 Barbara T. Lindemann et al., Employment Discrimination Law 21-33 (5th ed. 2012) ('An employer...should not be able to accomplish indirectly what the law prohibits being done directly.'). To deal with that circumstance, various tribunals have embraced the concept of constructive discharge." Pet.App. 16a-17a.

requirement had originally been disapproved in *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559 (1st Cir. 1986). "The test is whether '*a reasonable person* in the employee's shoes would have felt compelled to resign,' *Calhoun*, 798 F.2d at 561 (emphasis added), irrespective of employer intent." *Ramos*, 167 F.3d at 732 (footnote omitted). Then-Judge Breyer joined the decision in *Calhoun*. *Ramos* recognized that the courts of appeals are divided about this issue. "Most circuits employ an objective standard for constructive discharge....A minority requires proof of the employer's subjective intent to establish constructive discharge." *Id.* at 732 n.4.

The Third Circuit long ago held "that no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine." *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984).[5] *Goss* acknowledged that "there is a divergence of opinion as to whether...to...require[ ] a finding that the discrimination complained of amounted to an

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[5] *See Suders v. Easton*, 325 F.3d 432, 444 (3d Cir. 2003) (quoting *Goss*), *vacated on other grounds sub nom. Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004); *Levendos v. Stern Entertainment, Inc.*, 909 F.3d 747, 753 (3d Cir. 1990) (quoting *Goss*); *Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1230 (3d Cir. 1988) (quoting *Goss*).

intentional course of conduct calculated to force the victim's resignation." 747 F.2d at 887 [6]

One of the earliest decisions rejecting the special intent requirement is in the Fifth Circuit.

> Defendant urges, with some supporting authority, that in order to constitute a constructive discharge, the imposition of intolerable working conditions must be with the purpose of forcing the employee to resign....[S]uch a rule is inconsistent with authority in this Circuit and, we believe, with the realities of modern employment.

Bourque v. Powell Electrical Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980). That circuit in subsequent cases has consistently rejected that special intent standard.[7]

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[6] *Levendos* recognized that "at least two...different legal standards have emerged....Some courts have adopted a test based on an inquiry into the motive of the employer, holding, for example, that 'the employer's actions must have been taken with the intention of forcing the employee to quit.' *Johnson v. Bunny Bread, Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981)....Other courts, such as ours, have adopted a reasonable person test, which is focused on the impact of an employer's actions, whether deliberate or not, upon a 'reasonable' employee." 860 F.2d at 1230.

[7] *See Vallecillo v. U.S. Dep't of Housing and Urban Dev.*, 154 Fed.Appx. 764, 768 (5th Cir. 2005) ("proof that the employer imposed the intolerable conditions with the specific intent to force the employee is not required"); *Lamb v. City of Sweetwater Housing Authority*, 1993 WL 3471999 at *6 (5th Cir. Aug. 19, 1993); *Schwago v. Spradlin*, 701 F.2d 470, 481 n.12 (5th Cir. 1983) ("the employee need *not* prove it was the employer's purpose to force the employee to resign, but rather only that the employer made conditions intolerable") (emphasis in original);

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The Fifth Circuit has repeatedly acknowledged that other courts of appeals do apply that standard. "[S]ome other circuits have endorsed such a strict standard." *Boze v. Branstetter,* 912 F.2d 801, 804 (4th Cir. 1990). The Eleventh Circuit, which follows Fifth Circuit precedents established prior to the creation of the Eleventh Circuit, applies the rule in *Bourque. See Alliance Metals, Inc. v. Hinely Industries, Inc.,* 222 F.3d 895, 902-03 (11th Cir. 2000).

In *Nolan v. Cleland*, 686 F.2d 806 (9th Cir. 1982), in an opinion joined by then-Judge Kennedy, the Ninth Circuit adopted the Fifth Circuit rule in *Bourque,* "reject[ing] arguments that an employee has to prove it was the employer's intent to force the employee to resign." 686 F.3d at 813. "In *Nolan*...we adopted the Fifth Circuit's formulation of constructive discharge [as] later clarified in *Bourque*...." *Lojek v. Thomas,* 716 F.2d 675, 681 (9th Cir. 1983). "The test establishes an objective standard: the plaintiff need not show that the employer subjectively intended to force the employee to resign. *See...Nolan*, 686 F.2d at 814 n.17." *Watson v. Nationwide Ins. Co.,* 823 F.2d 360, 361 (9th Cir. 1987). *Satterwhite v. Smith*, 744 F.2d 1380, 1383 (9th Cir. 1984), rejected decisions

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Junior v. Texaco, Inc., 688 F.2d 377, 379 (5th Cir. 1982) ("it is not necessary to show that the employer subjectively intended to force a resignation"); *Pittman v. Hattiesburg Municipal Separate School Dist.*, 644 F.2d 1071, 1077 (5th Cir. 1981) ("[t]he employee...does not have to prove it was the employer's purpose to force the employee to resign").

from another circuit that "use language that focuses on the employer's subjective intent, rather than on the reasonable employee's perspective....This view is out of step with both the weight of authority and the law of our Circuit. *See Nolan*, 686 F.2d at 814 n.17." *Poland v. Chertoff*, 494 F.3d 1174, 1184 n.7 (9th Cir. 2007), noted that the requirement had also been rejected by the First, Third, Fifth and Tenth Circuits, but was applied by the Fourth, Sixth and Eighth Circuits.

The Tenth Circuit also rejects any requirement of proof that an employer intended to force a worker to resign, expressly noting the circuit conflict on that issue.

> There is...a divergence of opinion among the circuits as to the findings necessary to apply the [constructive discharge] doctrine. While some courts required the employee to prove the employer's specific intent to force him to leave, *Bristow v. Daily Press, Inc.*,..., others have adopted a less stringent objective standard requiring the employee to prove that the employer has made working conditions so difficult that a reasonable person in the employee's shoes would feel forced to resign. *Goss v. Exxon Office Systems Co*....In...our most recent pronouncement in this area, we... adopt[ed] the standard set out in [the Fifth Circuit decision in] *Bourque*...."[A]n employer's subjective intent is irrelevant...."

Derr v. Gulf Oil Corp., 796 F.2d 340, 343-44 (10th Cir. 1986) (quoting *Clark v. Marsh*, 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981)).[8]

In the District of Columbia Circuit, *Clark v. Marsh*, 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981), held that in a constructive discharge case "an employer's subjective intent is irrelevant...." In *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd on other grounds sub nom. Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the District of Columbia Circuit overturned a district court opinion that had required proof an employer subjectively intended to force a worker to resign. 825 F.2d at 427 (citing *Bourque* and *Goss*). *Simpson v. Federal Mine Safety and Health Review Commission*, 842 F.2d 453, 462 (D.C. Cir. 1988), in an opinion for the court by then-Judge Ginsburg, stated that "*Clark*...rejected a motivation test...." *Simpson* noted that "the predominan[t]... standard" disapproves such a requirement, citing decisions in the First, Second, Third, Fifth, Ninth and Tenth Circuits. 842 F.3d at 462 n.8. Then-Judge Ginsburg noted, however, the existence of

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[8] The Tenth Circuit has consistently applied that rule for more than three decades. *E.g.*, *Jeffries v. Kansas*, 147 F.3d 1220, 1233 (10th Cir. 1998) ("the employer's subjective intent...[is] irrelevant"); *Tran v. Trustees of the State Colleges of Colorado*, 355 F.3d 1263, 1270 (10th Cir. 2004) ("we apply an objective test under which neither the employee's subjective views of the situation, nor her employer's subjective intent with regard to discharging her, are relevant"); *Keller v. Crown Cork & Seal USA, Inc.*, 491 Fed.Appx. 908, 915 (10th Cir. 2012) (quoting *Tran*).

the contrary rule in several "federal circuits in which the subjective constructive discharge analysis persist[s]," 842 F.3d at 462 and n.8, citing decisions in the Sixth and Eighth Circuits.

2. The Fourth, Sixth and Eighth Circuits hold that in a constructive discharge case the plaintiff must prove that the employer intended to force the worker to resign.

Eighth Circuit precedent requires that, "[t]o prove a constructive discharge, an employee must show that the employer deliberately created intolerable working conditions with the intention of forcing her to quit." *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 418 (8th Cir. 2010). That Eighth Circuit requirement derives from that Circuit's key holding in *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981), that "[t]o constitute a constructive discharge, the employer's actions must have been taken with the intention of forcing the employee to quit." The Eighth Circuit has repeatedly applied that specific intent requirement over the decades since *Bunny Bread*.[9]

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[9] *E.g.*, *Hervey v. City of Little Rock*, 787 F.2d 1223, 1331 (8th Cir. 1986); *Smith v. Goodyear Tire & Rubber Co.*, 895 F.2d 467, 472 (8th Cir. 1990); *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 669 (8th Cir. 1992); *Spears v. Missouri Dept. of Corrections and Human Resources*, 210 F.3d 850, 854 (8th Cir. 2000); *Meyers v. Nebraska Health and Human Services*, 324 F.3d 655, 660 (8th Cir. 2003); *Moisant v. Air Midwest, Inc.*, 291 F.3d 1028, 1031 (8th Cir. 2002); *Cole v. May Dept. Stores Co.*, 109 Fed.Appx. 839,

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For more than thirty years, the Fourth Circuit has also required a plaintiff in a constructive discharge case to show the actions complained of "were intended by the employer as an effort to force the employee to quit." *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 672 (4th Cir. 1983), *rev'd on other grounds*, 467 U.S. 867 (1984). The Fourth Circuit applied the standard most recently in *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 425 (4th Cir. 2014).[10]

841-42 (8th Cir. 2004) ("[t]o prevail on her constructive discharge claim, Cole had to show that May deliberately created intolerable working conditions with the intention of forcing her to quit...."); *Tatum v. City of Berkeley*, 408 F.3d 543, 552 (8th Cir. 2005) (plaintiff required to adduce evidence that the City took action "with the intent to create an intolerable working environment, in order to compel [plaintiff] to resign"); *EEOC v. City of Independence*, 471 F.3d 891, 896 (8th Cir. 2006) ("'The employer's actions must have been intended to force the employee to quit.'") (quoting *Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 932 (8th Cir. 2000)); *Elnashar v. Speedway Superamerica, LLC*, 484 F.3d 1046, 1058 (8th Cir. 2007) ("[c]onstructive discharge occurs when an employer deliberately creates 'intolerable working conditions with the intention of forcing the employee to quit'") (quoting *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1159 (8th Cir. 1999)); *Devin v. Schwan's Home Service, Inc.*, 491 F.3d 778, 790 (8th Cir. 2007) (plaintiff must show that "her employer intended to force her to quit"); *Anda v. Wickes Furniture Co.*, 517 F.3d 526, 534 (8th Cir. 2008) ("Anda's constructive discharge claim fails because Anda provided no evidence that Wickes intended to force Anda to quit."); *Wilkie v. Dept. of Health and Human Servs.*, 638 F.3d 944, 954 (8th Cir. 2011) (quoting *Anda*); *Aubucon v. Geithner*, 734 F.3d 638, 645 (8th Cir. 2014) (quoting *Sanders v. Lee Cnty. Sch. Dist.*, 669 F.3d 888, 893 (8th Cir. 2012)).

[10] *See Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 186-97 (4th Cir. 2004); *Matvia v. Bald Head Island Mgmt., Inc.*,

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The Fourth Circuit candidly acknowledged that most circuits have rejected this requirement:

> The circuits are divided as to what a plaintiff must show....The majority of the circuits...rely on an objective standard of whether a "reasonable person" in the employee's position would have felt compelled to resign. The minority view, to which we subscribe, is that a plaintiff must also prove that "the actions complained of were intended by the employer as an effort to force the employee to quit."

Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1354 (4th Cir. 1995) (quoting *Paroline v. Unisys Corp.*, 879 F.2d 100, 114 (4th Cir. 1989) (Wilkinson, J., dissenting)). Justice O'Connor, sitting on a case in the Fourth Circuit, was constrained to apply that minority standard in her opinion for the court in *Lauture v. Saint Agnes Hospital*, 429 Fed.Appx. 300, 307 (4th Cir. 2011).

Since 1999 the Sixth Circuit rule has been that a constructive discharge claim requires proof that the employer acted "with the intention of forcing the employee to quit." *Moore v. Kuka Welding Systems*, 171 F.3d 1073, 1080 (6th Cir. 1999).[11]

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259 F.3d 261, 272 (4th Cir. 2001); *Taylor v. Virginia Union University*, 193 F.3d 219, 237 (4th Cir. 1999) (en banc) ("Deliberateness exists only if the actions complained of were intended by the employer as an effort to force the plaintiff to quit.").

[11] *See Goldfaden v. Wyeth Laboratories, Inc.*, 482 Fed.Appx. 44, 48 (6th Cir. 2012); *Savage v. Gee*, 665 F.3d 732, 739 (6th Cir.

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3. The existence of this circuit split has been acknowledged by the First, Third, Fourth, Fifth, Seventh, Ninth and District of Columbia Circuits. The United States noted in its brief in *Pennsylvania State Police v. Suders,* 542 U.S. 129, 141 (2004), that "[t]he courts of appeals are divided on whether an employee must make an additional showing that the employer intended to cause the employee to resign." Brief for the United States as Amicus Curiae, 14. The EEOC recognizes the existence of this circuit split. *Taylor v. Cheney,* 1990 WL 1112830 (Office of Fed. Ops.) (contrasting "majority view" and "minority viewpoint"; citing Eighth Circuit precedent). In *Suders* Justice Thomas observed that "a majority of Courts of Appeals have declined to impose a specific intent or reasonable foreseeability requirement." *Suders*, 542 U.S. at 152 (Thomas, J., dissenting). Several state courts have also recognized the division among the federal appellate courts.[12] Commentators have repeatedly described this circuit conflict.[13]

2012); *Ejikeme v. Violet,* 307 Fed.Appx. 944, 950 (6th Cir. 2009); *Tepper v. Potter,* 505 F.3d 508, 514-15 (6th Cir. 2007); *Johnson v. Rumsfeld,* 238 Fed.Appx. 105, 109 (6th Cir. 2007); *Watson v. City of Cleveland,* 220 Fed.Appx. 844, 856 (6th Cir. 2006); *Logan v. Denny's, Inc.,* 259 F.3d 558, 568-69 (6th Cir. 2001).

[12] *Pribil v. Archdiocese of St. Paul and Minneapolis,* 533 N.W.2d 410, 413 (Ct.App.Minn. 1995); *Brady v. Elixir Industries,* 196 Cal. App. 3d 1299, 1305 (4th Dist. 1987); *Lewis v. Oregon Beauty Supply Co.,* 714 P.2d 618, 621 (Or.App. 1986).

[13] "Most circuits...do not require the plaintiff to show [that] the employer specifically intended to force her to quit...[but] a minority of circuits...require that the plaintiff show that the

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4. The requirement that a plaintiff prove the employer acted with a specific intent to force his or her resignation is inconsistent with the text of Title VII and with this Court's decision in *Suders*.[14] That issue,

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employer subjectively intended to force [the plaintiff] to quit." Cathy Shuck, Comment, *"That's It, I Quit" Returning to First Principles in Constructive Discharge Doctrine*, 23 Berkeley J.Emp.&Lab.L. 401, 413, 415 (2002); *see* Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U.Chi.L.Rev. 561, 562 (1986) ("The circuit courts split over whether (and to what degree) specific employer intent is a required element of constructive discharge[.] Most circuits...do not require the plaintiff to show the employer specifically intended to force her to quit....Under the minority view, the plaintiff must show not only that conditions were intolerable, but also that the employer created those conditions with the specific intent of forcing her to resign.") (emphasis and capitalization omitted).

[14] In *Suders*, this Court set out a single, straightforward standard for determining when discrimination (or retaliation) would give rise to a constructive discharge claim. "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" 542 U.S. at 141. The *Suders* standard is expressly "objective"; neither the subjective state of mind of the employee nor that of the employer (other than an intent to discriminate or retaliate) is relevant.

The specific intent requirement utilized by the Fourth, Sixth and Eighth Circuits engrafts onto Title VII an additional motivation element that goes beyond the very specific language of the statute. The general anti-discrimination in section 703(a) forbids without limitations actions taken "because of such individual's...sex." 42 U.S.C. § 2000e-2(a)(1). Similarly, section 701 provides that the discrimination forbidden by Title VII includes adverse action taken "because of or on the basis of pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e. An adverse action taken for any of these forbidden purposes is unlawful, regardless of what consequences the

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of course, is not before the Court. But some lower court opinions analyzing the limitations question presented by this case have characterized constructive discharge claims in terms which imply or assume that such intent is required. We urge this Court to avoid such characterizations.

III. THE COURT SHOULD NOT RESOLVE THE CIRCUIT CONFLICT REGARDING WHETHER IN A CONSTRUCTIVE DISCHARGE CASE THE WORKER MUST COMPLAIN TO HIGHER MANAGEMENT PRIOR TO RESIGNING

The circuit courts are divided about whether in a constructive discharge case the employee is required, prior to resigning, to go over the head of the company official who has engaged in unlawful discrimination or retaliation, and complain to someone else.[15] "[W]hether the employee's duty to report ought

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discriminatory employer might have hoped would ensue. Section 1981a establishes an additional mental state requirement for punitive damages, requiring proof that an employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Even punitive damages can be awarded without the need for proof that an employer intended any specific harm, or any harm at all.

[15] Employers ordinarily are strictly liable for unlawful discrimination or retaliation by their agents. In certain instances of sexual or racial harassment, an employer might be able to avoid liability by showing, inter alia, that the victim unreasonably failed to invoke the employer's own corrective mechanisms. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). But that

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to be extended to cover cases of constructive discharge is the most critical policy question that the courts must confront...[T]he current debate over the proper classification of constructive discharge masks an important difference of opinion over the legal significance of a plaintiff's use of, or failure to use, an employer's internal grievance procedure." Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge,* 77 S.Cal.L.Rev. 307, 373 (2004).

The court of appeals below described constructive discharge claims in terms that suggest that workers are required to complain to higher management.[16] This Court should avoid such characterizations, and should leave this issue for resolution in another case.

1. Several circuits have rejected this requirement. In the Third Circuit, whether a worker complained to other officials is just one of several factors that bear on whether a reasonable person would have resigned when the plaintiff did. The Third Circuit

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rule does not apply to non-harassment cases, or to harassment cases in which the harassment culminated in a tangible employment action, in which the harasser was an alter-ego of the company, in which the harasser expressly relied on his supervisory authority, in which the employer lacked a sufficient practice to prevent and correct harassment, or in which some other employee had complained about the harasser. *Id.*

[16] "[S]ociety and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships." Pet.App. 21a (quoting *Derr,* 796 F.2d at 342).

subsequently reiterated that there is no "*quasi* exhaustion requirement" that plaintiffs in constructive discharge cases must file some sort of internal complaint or protest before resigning. *Suders v. Easton*, 325 F.3d 432, 445 (3d Cir. 2003), *vacated on other grounds sub nom. Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). Whether a worker first pursued such an internal complaint is only

> another important consideration...that relates to the inquiry of whether a reasonable person would have felt compelled to resign....[I]t is relevant to a claim of constructive discharge whether a plaintiff explored alternative avenues to resolve the alleged discrimination, but the plaintiff's actions must be considered in light of the totality of circumstances. *Clowes* [*v. Allegheny Valley Hospital*, 991 F.2d 1159, 1162 n.6 (3d Cir. 1993)] simply recognizes that, in many cases, a reasonable person will not react to minor harassment or workplace disturbances by heading straight for the exit and that, in others, the harassment or discrimination may be so severe that any reasonable person would feel compelled to walk out immediately....[A] failure to [explore alternative avenues] will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign.

325 F.3d at 445-46. "We do not require that such steps be taken in all cases. An employee may be able to

show working conditions were so intolerable that a reasonable employee would feel forced to resign without remaining on the job for the period necessary to take those steps." *Clowes* (opinion by Alito, J.).

Young v. Southwestern Savings and Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) rejected this type of exhaustion requirement. In *Young*, the plaintiff was told by the manager of the office where she worked that she was required to attend morning meetings that were commenced with a prayer and religious talk by a local minister, despite her religious objections. She resigned the same day without attempting to complain about that directive to higher ranking officials. 509 F.3d at 142. The court rejected defendant's argument that it was not liable because "the manner of Mrs. Young's leaving was so precipitous as to give Southwestern no opportunity to accommodate her beliefs....Southwestern urges that if only plaintiff had contacted a high-ranking officer before leaving, the entire matter would have been quickly resolved in a mutually agreeable fashion." 509 F.2d at 144-45. The majority also rejected the suggestion of a dissenter that it allow "an employee to claim constructive discharge only after requesting an authoritative ruling from the company management [in order to] encourage private settlement of employment disputes." 509 F.2d at 146 (Thornberry, J., dissenting).

The Seventh Circuit takes a quite different approach. In that circuit there is no requirement that workers utilize internal complaint processes in every constructive discharge case; rather, a failure to

complain may be evidence that the discriminatory conditions were not that serious.

> In some situations, the standard of reasonableness will require the employee who wants to make a successful claim of constructive discharge to do something before walking off the job. The reason is not that there is a doctrine of exhaustion of remedies....The reason, rather, is that passivity in the face of working conditions alleged to be intolerable is often inconsistent with the allegation....The significance of passivity is thus evidentiary.

Lindale v. Tokheim Corp., 145 F.3d 953, 955 (7th Cir. 1998). Here, as in the Third but not the Eighth Circuit, a jury would assess the significance of a failure to complain, weighing it against other evidence. But the absence of a complaint is relevant in the Seventh Circuit for a reason and in a way entirely different than in the Third or Eighth Circuit. The failure to complain, if coupled with a delay in resigning, would in the Seventh Circuit be evidence that the working conditions were not really all that bad; but if the worker resigned promptly, the failure to complain would not affect a plaintiff's claim.

2. The Eighth Circuit has held repeatedly that the absence of a sufficient number of internal complaints bars a constructive discharge claim. The range of circumstances in which the Eighth Circuit has held that complaints are required demonstrate the exceptional consequences of such an internal

exhaustion requirement. The Eighth Circuit first applied its internal-complaint requirement in *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490 (8th Cir. 1996). The plaintiff

> had made earlier complaints about Meyers' racially discriminatory scheduling practices to the...production manager and the assistant production superintendent....Tidwell and four other African-American [employees had earlier] filed a race discrimination charge against Meyer's with the Equal Employment Opportunity Commission, claiming that the...shift assignments were determined in a racially discriminatory manner.

93 F.3d at 493 n.4. When the company again gave a favored shift assignment to a less experienced white worker, Tidwell resigned. The Eighth Circuit dismissed his constructive discharge claim on the ground that – despite the prior complaints and EEOC charge – he had failed to "give [the employer] an opportunity to explain the situation or remedy it." 93 F.3d at 496.

Knowles v. Citicorp Mortgage, Inc., 142 F.3d 1082, 1086 (8th Cir. 1998), rejected the plaintiff's constructive discharge claim because "[a]lthough Knowles argued that he exhausted *all* avenues of relief in seeking a solution to his problems at Citicorp, the record reveals that, *aside from* discussing [his supervisor's biased] comments with [the supervisor's superior], he took few, if any, steps toward this end. Knowles neglected to so much as mention his

concerns to anyone in Citicorp's human resources department or to any of his co-workers. Furthermore, he made no attempt to utilize Citicorp's internal grievance procedures or even to inquire about the possibility of doing so." (Emphasis added). Similarly, in *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241 (8th Cir. 1998), the plaintiff had complained about retaliation both to the plant personnel representative and to a manager; the court of appeals dismissed her constructive discharge claim because she had failed to also pursue those allegations "up the chain of command to [the vice-president for human resources]." 141 F.3d at 1247

Repeated internal complaints were also deemed insufficient in *Tork v. St. Luke's Hospital*, 181 F.3d 918 (8th Cir. 1999).

> [The worker] attempted to protest the first [disputed action] by speaking with someone in the...human resources department, but was denied the opportunity to do so, and...intended to exercise her right to file a formal complaint with the employee assistance program, but was told by her supervisor that it was too late to do so. With respect to the second [disputed action]...she tried to speak to her supervisor about it, but was ignored.

181 F.3d at 919-20. The Eighth Circuit rejected the plaintiff's constructive discharge claim on the ground that she should have done even more. "Ms. Tork sought review beyond her direct supervisor...for only

one incident....She failed to seek review of her supervisor's action through either the human resources department or the employee assistance program...." 181 F.3d at 920. *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678 (8th Cir. 2001), held that it is not sufficient that a worker complained about a discriminatory practice to his or her supervisor; if the supervisor is unresponsive, the worker must then appeal that supervisor's decision to higher officials or forfeit his or her constructive discharge claim. In *Sowell*, the plaintiff had earlier complained about a discriminatory manager "to officials from [the company's] local and Colorado human resources offices." 251 F.3d at 681, and again complained to her direct supervisor when that official adopted a disputed policy. The court rejected her constructive discharge claim because she had not complained enough. "Sowell complained to [her supervisor] regarding the policy, but she took no *further* steps to exempt herself from its requirements, such as...approaching human resources about the policy itself...." 251 F.3d at 685 (emphasis added).

The Eighth Circuit has explained that this requirement is a judicially fashioned *per se* rule applying the holding in *Suders* that a constructive discharge claim requires proof that a reasonable person in the same circumstances would have resigned. "To be reasonable, an employee must give her employer a reasonable opportunity to correct the problem." *Jackson v. Arkansas Dep't of Educ.*, 272 F.3d 1020, 1027 (8th Cir. 2001).

3. A requirement that a plaintiff complain to some other, higher official prior to resigning is inconsistent with the text of Title VII and with this Court's decision in *Suders*.[17] That issue, of course, is not

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[17] The requirement that a discrimination victim afford to a discriminatory employer a "reasonable opportunity" to correct its violation is, as the Third Circuit recognized, a judicially created exhaustion requirement. But the exhaustion requirements in Title VII itself are quite specific and limited, and the courts have no authority to require more than Congress saw fit to mandate. Under section 706(c), the entity to which a discrimination victim must complain is the EEOC or a state or local anti-discrimination agency, not to the victim's employer. 42 U.S.C. § 2000e-5(c). Congress contemplated that under the statutory exhaustion scheme, employers would learn of discrimination charges through the EEOC, which is directed to notify the employer within 10 days of the receipt of a charge. 42 U.S.C. § 2000e-5(b). The statutory deadline for complaints by private employees is 180 or 300 days, not prior to resigning. 42 U.S.C. § 2000e-5(c)(1). The Eighth Circuit may believe it would be better if employees complained to their employers directly, rather than through the EEOC, or if managers did not have to wait 180 to 310 days to learn about discriminatory practices by other company officials. But that is not the exhaustion scheme which Congress chose to enact.

This Court's decision in *Suders* explained that a worker could establish a constructive discharge by showing that a reasonable person would have resigned in response to the unlawful employer action at issue. The Eighth Circuit rule is based in part on the court's view that it would be *per se* unreasonable for an employee to resign without complaining up the chain of command. But this Court has made clear that the assessment of what a reasonable person would do is an issue for the trier of fact, not a question of law.

When the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer.

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before the Court. But some lower court opinions analyzing the limitations question presented by this case have characterized constructive discharge claims in terms which imply or assume that workers are required to exhaust any employer-created channels for complaint. We urge this Court to avoid such characterizations.

See, e.g., United States v. Gaudin, 515 U.S. 506, 512 (1995) (recognizing that "'delicate assessments of the inferences a "reasonable [decisionmaker]" would draw...[are] peculiarly one[s] for the trier of fact....'" (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1946); first alteration in original)); *id.*, at 450, n.12 (observing that the jury has a "unique competence in applying the 'reasonable man' standard"); *Hamling v. United States*, 418 U.S. 87, 104-05 (1974) (emphasizing "the ability of the juror to ascertain the sense of the 'average person'" by drawing upon "his own knowledge of the views of the average person in the community or vicinage from which he comes" and his "knowledge of the propensities of a 'reasonable' person"); *Railroad Co. v. Stout*, 17 Wall. 657, 664, 21 L.Ed. 745 (1874) ("It is assumed that twelve men know more of the common affairs of life than does one man, [and] that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."). *See Hana Financial, Inc. v. Hana Bank*, 135 S.Ct. 907, 911 (2015) (because constructive discharge is a preeminent instance of the reasonable person standard under *Suders* it ought to be routinely a jury issue).

CONCLUSION

For the above reasons, the decision of the Tenth Circuit should be reversed.

Respectfully submitted,

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No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN,
POSTMASTER GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF THE JUDGMENT BELOW

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the question presented in this case: In a claim of constructive discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, does the administrative limitations period begin with the last discriminatory or retaliatory act of the employer, or does it begin instead with the employee's resignation?[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

Amicus is committed to ensuring a reasonable interpretation of federal statutes and regulations

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), amicus also states that counsel of record for the petitioner and for the respondent have both given their written consent to the filing of this brief, which amicus has filed herewith.

that determine the rights and duties of employers. In particular, NELF advocates adherence to the plain language of such provisions, to give full effect to legislative and administrative intent. In so doing, NELF also advances its goal of honoring legislative and administrative policy choices that balance the competing interests of employers and employees, here with respect to the timeliness of claims.

In this connection, NELF has filed amicus briefs in this Court in recent cases that also raise important issues of interpretation under Title VII and other federal statutes affecting employers. *See Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014); *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the issue presented in this case.

SUMMARY OF ARGUMENT

In a claim for constructive discharge, as with most any other claim of discrimination or retaliation under Title VII, the administrative limitations period begins with the employer's last discriminatory or retaliatory act, not with the employee's resignation in response to that conduct. This is required by the plain language of the limitations provision applicable to federal-sector employees under the EEOC regulation, and by Title VII's general provision applicable to both private-sector and state employees. And the Court has already interpreted Title VII's provision as focusing on the

employer's challenged conduct, not on the injurious consequences to the employee. *Delaware State College v. Ricks,* 449 U.S. 250 (1980). *Ricks* should apply here because the relevant language in the EEOC regulation is synonymous with Title VII's limitations provision, and because neither provision treats constructive discharge claims differently from the "traditional" discrimination claim discussed in *Ricks.*

Moreover, the Court has observed that Congress would have been well aware of constructive discharge claims when it enacted Title VII. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141-42 (2004). And yet Congress made no special allowance concerning the timeliness of constructive discharge claims. Therefore, Congress should be deemed to have rejected any differential treatment for the filing of constructive discharge claims by private-sector and state employees under Title VII. And the EEOC, in turn, should be deemed to have followed suit with its similarly worded provision for federal employees.

Suders also held that, in a constructive discharge claim under Title VII, the employee's decision to resign is *not* an action imputed to the employer. Instead, the resignation remains a separate act of the employee. Therefore, the resignation is not an "alleged unlawful employment practice" under Title VII or a "matter alleged to be discriminatory" under the EEOC regulation.

While the employer may indeed be liable in damages for the employee's resignation *as if* it were

a termination, *Suders* carefully distinguished the employer's monetary liability from any vicarious liability for the employee's resignation. The employer is liable in damages for the employee's reasonable resignation simply because the resignation is a foreseeable consequence of the employer's proven wrongful conduct.

After all, *Suders* explained that a constructive discharge claim is merely "an aggravated case" of discrimination or retaliation. The only difference between a constructive discharge claim and the underlying claim of discrimination or retaliation is the severity of the employer's wrongful conduct, and hence the applicable measure of damages. There is no reason, therefore, why the limitations period should be any different for the constructive discharge claim merely because the employee is seeking additional remedies that would not apply in the underlying claim of discrimination or retaliation.

Finally, *Suders* teaches that a constructive discharge claim is an objective inquiry, asking whether the employee's resignation was a reasonable response to the employer's challenged conduct. The facts necessary to determine such reasonableness are generally established once the employer has taken official action against the employee, or when a supervisor or co-worker has committed the last in a series of related acts of harassment against the employee before he resigns. At that moment in time, the employee is most likely on notice that resignation may be the only reasonable response to the employer's allegedly severe conduct. Therefore, this inquiry focuses on the severity of the employer's

disputed conduct. It does not concern the particular timing of each employee's resignation. Accordingly, the employer's conduct should begin the limitations period, not the employee's subsequent resignation in response to that conduct.

ARGUMENT

I. IN A CLAIM FOR CONSTRUCTIVE DISCHARGE UNDER TITLE VII, THE ADMINISTRATIVE LIMITATIONS PERIOD SHOULD BEGIN WITH THE EMPLOYER'S LAST DISCRIMINATORY OR RETALIATORY ACT, NOT WITH THE EMPLOYEE'S RESIGNATION.

At issue here is what event begins the administrative limitations period in a claim for constructive discharge under Title VII. Do the employee's administrative exhaustion requirements commence with the employer's last discriminatory or retaliatory act,[2] or do they commence instead with the employee's resignation?

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[2] Amicus intends "the employer's last act" to refer to either a single, "tangible" employment action or, in a hostile work environment claim, the last in a series of related acts of harassment occurring before the employee resigns. This is consistent with the Court's observation that a constructive discharge claim can arise from an official employment action, from a claim of supervisory harassment, or from a claim of co-worker harassment. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004) ("[H]arassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts."). *See also id.*, 542 U.S. at 134 (discussing constructive discharge claim arising from either hostile work environment or tangible employment action, such as "a humiliating demotion, extreme

The petitioner, Marvin Green, was an employee of the United States Postal Service ("USPS"). *See Green v. Donahoe*, 760 F.3d 1135, 1137 (10th Cir. 2014). He alleges a constructive discharge in retaliation for having raised a prior claim of racial discrimination against his employer. *Id.* As a federal-sector employee, Green was required to initiate contact with an Equal Employment Opportunity ("EEO") counselor "within 45 days of the date of the *matter alleged to be discriminatory* or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1) (emphasis added).

The USPS's actions that precipitated Green's alleged constructive discharge occurred no later than December 16, 2009, when Green signed a USPS agreement requiring him to relinquish his position immediately and either retire or accept a position at lower pay in a location about 300 miles away. *See Green*, 760 F.3d at 1138. On February 9, 2010, Green submitted his retirement papers. *Id.* On March 22, 2010, Green initiated counseling with an EEO counselor, alleging a constructive discharge. *Id.* This took place more than 45 days after the disputed employment action but less than 45 days after Green's resignation.

Notably, the lower court and the parties in this case have focused solely on "the matter alleged to be discriminatory" as the applicable regulatory language. *See* Brief of Respondent, at 13-14. This is significant because the "matter alleged to be

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cut in pay, or transfer to a position in which [the employee] would face unbearable working conditions.").

discriminatory" is substantially similar to the operative phrase "alleged unlawful employment practice," which occurs in Title VII's administrative filing requirement for private-sector and state employees. 42 U.S.C. § 2000e-5(e)(1) ("A charge [of discrimination or retaliation] shall be filed within one hundred and eighty days [or three hundred days, under certain circumstances] after the alleged unlawful employment practice occurred . . . .").

In NELF's view, the regulatory phrase "discriminatory matter" is synonymous with the statutory phrase "unlawful employment practice." Both terms identify the employer's allegedly wrongful conduct as the event that triggers the administrative limitations period in a Title VII claim. Therefore, resolution of the issue in this case, which concerns a federal-sector employee, should decide the issue of timeliness for *all* employees bringing claims of constructive discharge under Title VII.

A. According To The Plain Language Of The Limitations Provisions, The Employer's Precipitating Conduct Triggers The Administrative Time Period For Pursuing Title VII Claims.

As with the interpretation of a statute, the applicable regulation of the Equal Employment Opportunity Commission ("EEOC") should be confined to the plain meaning of its terms. See *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("When the statute's language is plain, the sole function of the courts . .

is to enforce it according to its terms.") (citation and internal quotation marks omitted). As discussed above, the regulation requires an employee to contact an EEO counselor within 45 days of "the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1). "The matter alleged to be discriminatory" can only refer to the employer's actions that gave rise to the employee's Title VII claim, here a claim of constructive discharge.

This interpretation is confirmed by the second phrase in the same sentence of the EEOC regulation, quoted above, which refers to the effective date of a "personnel action" as an alternative triggering event. 29 C.F.R. § 1614.105(a)(1). *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (statutory terms should be interpreted in context). The phrase "personnel action" clearly refers to the employer's conduct as the event that triggers the limitations period. There can be no doubt, then, that the neighboring phrase, "the matter alleged to be discriminatory," also refers to the employer's conduct, not to the employee's response to that conduct.[3]

Tellingly, the EEOC regulation does not refer to the employee's response to the employer's

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[3] This is further confirmed by the EEOC's use of the same operative word "matter" in the first paragraph of the same regulation. *See* 29 C.F.R. § 1614.105(a) ("Aggrieved persons who believe they have been *discriminated against* on the basis of race, color, religion, sex, national origin must consult a Counselor prior to filing a complaint in order to try to informally resolve the *matter*.") (emphasis added). From this context it is clear that "matter" refers to the employee's claim that the employer took discriminatory action against him.

challenged conduct, or to any injury that the employee may have suffered as a consequence of that conduct. As with the cognate "alleged unlawful employment practice" language in Title VII's limitations provision, "the proper focus [of the limitations inquiry] is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Delaware State College v. Ricks,* 449 U.S. 250, 258 (1980) (Title VII limitations period began when professor was denied tenure, not when he was subsequently discharged from college under terms of employment contract) (citation and internal quotation marks omitted).

Under *Ricks*, a constructive-discharge plaintiff's resignation is clearly an alleged injurious consequence of the employer's wrongful conduct. *Ricks* also emphasized that an employee's remaining on the job for a limited period of time after the employer's disputed conduct has transpired does not toll the running of the limitations period. "Mere continuity of employment [after the occurrence of the adverse employment action], without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Ricks*, 449 U.S. at 257 Therefore, the administrative limitations period should begin with the employer's conduct, not with the employee's subsequent act of resigning in response to that conduct.

While *Ricks* did not involve a constructive discharge claim, its holding should nonetheless apply here. Neither Title VII nor the EEOC regulation carves out an exception for the initiation

of constructive discharge claims. Instead, the relevant language refers generally to any "matter" or any "practice" alleged to be discriminatory as the event that triggers the administrative limitations period.

And, as the Court has observed, Congress would have been well aware of constructive discharge claims when it enacted Title VII. "By 1964, the year Title VII was enacted, the doctrine [of constructive discharge] was solidly established in the federal courts." *Suders*, 542 U.S. at 142. *See also id.* at 141 (discussing origins of constructive discharge claim in 1930's labor law cases). And yet Congress made no special allowance concerning the timeliness of constructive discharge claims. Therefore, Congress should be deemed to have rejected any differential treatment for the filing of constructive discharge claims by private-sector employees under Title VII. And the EEOC, in turn, should be deemed to have followed suit with its similarly worded provision for federal-sector employees, applicable here.

B. Under *Pennsylvania State Police v. Suders*, The Employee's Resignation Is Not An Action Imputed To The Employer, Even Though The Employer May Be Liable In Damages For The Resignation.

But *Ricks* is not the only precedent of this Court that effectively answers the question presented in this case. In *Suders*, discussed above, the Court held that, in a constructive discharge claim under Title VII, the employee's resignation is *not* an action attributable to the employer. "A constructive discharge involves both an employee's decision to leave and precipitating conduct: *The former involves no official action . . . .*" *Suders*, 542 U.S. at 148 (emphasis added).[4]

Since *Suders* holds that the employee's resignation is not an act imputed to the employer, the resignation is also not a "matter alleged to be discriminatory," or an "alleged unlawful employment practice," for purposes of the limitations periods under the EEOC regulation and Title VII. Accordingly, the employer's conduct triggers the limitations period in a claim for constructive

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[4] More precisely, *Suders* held that, in a claim of supervisory harassment culminating in a constructive discharge, the employee's resignation is *not* a tangible employment action. *See Suders*, 542 U.S. at 148. Instead, the resignation remains a separate act of the employee. *Id.* Therefore, the employer defending such a claim is not strictly liable and has recourse to the affirmative defense to liability that the Court had announced in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). *See Suders*, 542 U.S. at 148-49.

discharge, just as it would for most any other claim of discrimination or retaliation under Title VII. *See, e.g., Ricks,* 449 U.S. at 258 (filing period in Title VII claim for national-origin discrimination began when employer denied employee tenure).

While the employer may indeed be liable in damages for the employee's resignation *as if* it were a termination, the Court in *Suders* carefully distinguished the employer's monetary liability from any vicarious liability for the employee's decision. "To be sure, a constructive discharge is functionally the same as an actual termination in *damages-enhancing respects.* But when an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer." *Suders,* 542 U.S. at 148 (emphasis added).

And so, while the employer may be liable for back pay, and possibly front pay, this is not because the prevailing employee's resignation becomes an act committed by the employer. Rather, the employer is liable for the employee's reasonable resignation simply because it is a foreseeable injury or consequence arising from the employer's proven wrongful conduct. "Under the constructive discharge doctrine, an employee's reasonable decision to resign is assimilated to a formal discharge *for remedial* purposes." *Suders,* 542 U.S. at 141 (emphasis added). *See also United States v. Burke,* 504 U.S. 229, 232 n.2, 237 n.8, 241 n.12 (1992) (discussing expansion of Title VII by Civil Rights Act of 1991 to include tort-like remedies).

After all, a constructive discharge claim is merely "an aggravated case" of discrimination or retaliation. *See Suders*, 542 U.S. at 146 ("The constructive discharge here at issue stems from, and can be regarded as an aggravated case of, sexual harassment or hostile work environment.")[5] In such a claim, the employee resigns and then alleges that the employer engaged in wrongful conduct that was so severe that the employee reasonably felt compelled to quit. *See Suders*, 542 U.S. at 147

The only difference, then, between a constructive discharge claim and the underlying claim of discrimination or retaliation is the *severity* of the employer's wrongful conduct, and hence the applicable measure of damages. "[T]he only variation between the two claims is the severity of the hostile working conditions." *Suders*, 542 U.S. at 149. That is, the constructive discharge claim is a dependent claim that rides "piggyback" on the underlying claim of discrimination or retaliation. In such a claim, the employee seeks additional recovery for his resignation as an alleged consequence of the employer's severe misconduct. *See id.*, 542 U.S. at 148-49. There is no reason why the limitations period should be any different for the constructive discharge claim merely because the employee seeks additional remedies that would not apply in the underlying claim of discrimination or retaliation.

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[5] While *Suders* concerned a hostile work environment-constructive discharge claim, that case should apply equally to a tangible employment action-constructive discharge claim. As discussed in n.2, above, *Suders* instructs that a constructive discharge claim can arise from either a single, official act of the employer or a series of harassing acts forming a hostile work environment. *See Suders*, 542 U.S. at 134, 148.

C. *Under Suders*, A Constructive Discharge Claim Entails An Objective Inquiry Focusing On The Severity Of The Employer's Conduct, Not On The Actual Timing Of A Particular Employee's Decision To Resign.

Suders provides further support here because it teaches that a constructive discharge claim entails an objective inquiry, asking whether the employee's resignation was a reasonable response to the employer's challenged conduct. "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Suders*, 542 U.S. at 141.

The facts necessary to determine this reasonableness element of the claim are generally established once the employer has taken official action against the employee, or when a supervisor or co-worker has committed the last in a series of related acts of harassment against the employee before he resigns.[6] At that moment in time, the employee is most likely on notice that resignation may be the only reasonable response to the employer's allegedly severe conduct. Therefore, this inquiry focuses on the severity of the employer's disputed conduct. It does not concern the particular timing of each employee's resignation. Accordingly, the employer's conduct should begin the limitations period, not the employee's subsequent resignation in response to that conduct.

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[6] *See* n.2, above.

In sum, the plain language of the limitations provisions and this Court's relevant precedent establish that, in a claim for constructive discharge, as with most any other Title VII claim, the employer's disputed conduct begins the administrative limitations period. While the employer may incur liability for the employee's resignation, the resignation remains an act of the employee that is, at best, an injurious and compensable consequence of the employer's conduct. And the employee is typically on notice of this injurious consequence with the last discriminatory or retaliatory act of his employer.

CONCLUSION

For the reasons stated above, amicus respectfully requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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